

# OFFICE OF SURFACE MINING'S PERMIT FEES

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON  
NATURAL RESOURCES DEVELOPMENT AND  
PRODUCTION  
OF THE  
COMMITTEE ON  
ENERGY AND NATURAL RESOURCES  
UNITED STATES SENATE  
NINETY-NINTH CONGRESS  
FIRST SESSION  
ON THE  
IMPACT ON THE COAL INDUSTRY OF THE OFFICE OF SURFACE MIN-  
ING'S PROPOSED RULEMAKING TO COLLECT PERMIT APPLICATION  
FEES IN THE DOMESTIC COAL INDUSTRY

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JULY 9, 1985



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## OFFICE OF SURFACE MINING'S PERMIT FEES

TUESDAY, JULY 9, 1985

U.S. SENATE,  
SUBCOMMITTEE ON NATURAL RESOURCES  
DEVELOPMENT AND PRODUCTION,  
COMMITTEE ON ENERGY AND NATURAL RESOURCES,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-366, Dirksen Office Building, Hon. John W. Warner presiding.

Present: Senators Warner, Wallop, Hecht, Ford, and Rockefeller.

Also present: Patrick Sullivan, professional staff member; and Linda Mason, professional staff member for the minority.

### OPENING STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Good morning, ladies and gentlemen.

Today the Subcommittee on Natural Resources Development and Production will hear testimony from a variety of witnesses regarding the impact on the coal industry of a proposed rulemaking by the Department of the Interior's Office of Surface Mining. The proposed rule would, for the first time, assess coal operators for the actual cost of processing permits as stipulated in section 507(a) of the Surface Mining Control and Reclamation Act of 1977.

I am deeply concerned about the plight of the American coal industry. Hampered by high production costs, expensive transportation rates, the strong dollar, excess world energy capacity, Federal regulations, and foreign coal imports, we are seeing a decline in the development of our Nation's most abundant energy source—coal.

Just last month, this committee conducted an oversight hearing on the impact of coal imports on our domestic coal industry. The hearing indicated that coal imports could spread throughout the gulf and the east coast in the next several years, putting American coal miners in stiff competition and possibly out of work.

I was alarmed to learn that much of the infrastructure necessary to develop a particular mine located in Colombia is being financed through the Export-Import Bank. To date, over \$850 million in financial assistance has flowed into Colombia. That our country offers financial assistance to countries to develop foreign coal reserves which could not only displace American coal production but also undercut some of our already established markets, is a subject that bears our closest scrutiny.

Coal imports are just one of the many problems facing the coal industry today. Let me turn to another potential setback awaiting

the American coal industry, which is the focus of the hearing today.

On February 22, 1985, the Department of the Interior's Office of Surface Mining issued a proposed rule to require the Federal Government to collect fees on the actual costs of mine permitting, coal exploration permits, and other regulatory requirements placed on the industry under the Surface Mining Act.

In light of our excessive Federal deficit, we have an obligation to the American people to reduce costs in Government as much as possible, and I strongly support this with reference to coal. But we must look very carefully to make certain that in charging these fees on coal operations, we are not arbitrarily assessing onerous demands on companies that are already at a competitive disadvantage in the world coal market.

We must also look to see who benefits from the numerous mining regulations imposed on our coal companies. Should the coal industry be saddled with the entire costs of Federal regulation that ultimately benefit the American public? We must seek a balance.

I cannot help but note the irony of the Federal Government assisting foreign coal producers in competing in the world coal market, while at the same time imposing more fees on an already beleaguered domestic coal industry. As we drive up our domestic coal prices by imposing costly fees, do we not subsidize foreign coal operations at another point?

I welcome all the witnesses this morning and look forward to the testimony. The entire statement of each witness will be made a part of the record, and I encourage all witnesses to summarize their testimony.

Senator Ford.

#### STATEMENT OF HON. WENDELL H. FORD, A U.S. SENATOR FROM THE STATE OF KENTUCKY

Senator FORD. Mr. Chairman, I appreciate your allowing me to be here this morning on this committee, since I am not a member of this subcommittee. You've always been very gracious in allowing others to attend, and I want you to know I sincerely appreciate it.

When you were making your statement and you referred to Colombia, I thought about a television ad I see every once in awhile, and all I want to do is say, "Atta boy, John." And I want to endorse what you've said. It's been a revelation to us to see how we are jeopardizing our own industry here. I look forward to the testimony today, and I think it's a very timely and important hearing, and I appreciate the opportunity to be here.

Senator WARNER. I thank the Senator.

Senator Wallop.

Senator WALLOP. Mr. Chairman, thank you. I have no opening statement.

I'm here to endorse your statement and our Governor's statement, which I have read. And I think he sums up quite well in his statement in the third paragraph exactly how I feel about this. And I'll wait for our Governor, whose awareness of what the coal industry means to the economy of Wyoming is obvious.

Here we are now, the third largest coal producing State and—

Senator WARNER. I thought you were second.

Senator WALLOP [continuing]. Actions like this are of great economic significance to our State.

Senator WARNER. I thank the Senator from Wyoming. Indeed you have been at the forefront of all the issues relating to coal since I've been privileged to associate with you here in the Senate.

The Senator from Nevada.

Senator HECHT. No statement, Senator.

Senator WARNER. I'd like to also add to the record that the distinguished Senator from West Virginia, Senator Byrd, proposed an amendment which I cosponsored not long ago and which was accepted by the Senate, which directed the Export-Import Bank to issue a report in 30 days to the Senate Energy and Natural Resources Committee on its assistance to foreign nations producing export coal.

That's another step.

We are now privileged to have a very distinguished witness lead off this hearing. The Chair invites the Honorable Ed Herschler, the Governor of Wyoming, on behalf of the Western Governors' Coal Association.

Governor.

#### STATEMENT OF HON. ED HERSCHLER, GOVERNOR OF WYOMING, ON BEHALF OF THE WESTERN GOVERNORS' ASSOCIATION

Governor HERSCHLER. Thank you very much, Mr. Chairman, members of the subcommittee. I am pleased to be here before this oversight hearing this morning to comment on the proposed rule of the Federal Office of Surface Mining which would establish a fee to recover OSM's costs in processing permit applications and mine plans for surface mining operations.

Senator WARNER. Governor Herschler, we find in this room the acoustics to be less than the best. Please speak up, because there are many persons anxious to hear your important testimony.

Governor HERSCHLER. Thank you, Senator.

I strongly oppose the OSM's proposed rule for reasons which I think warrant congressional action. If finalized, the rule would confuse and frustrate the important goals of the Federal act, heighten agency inefficiencies and problems, and disproportionately impact coal production from Federal lands.

On the first point relating to the Federal law, I first question whether the proposed permit fee rule meets the statutory requirement that rules be necessary to carry out the purposes and provisions of the act, and I refer to section 30 of the United States Code, section 1211(c)(2). The purposes of the act are detailed in section 102. The act clearly reflects, I believe, Senator, the congressional sentiment that a nationwide program is necessary to protect society and the environment from the adverse effects of surface coal mining. In fact, the full reach of the Federal constitutional powers is brought to the task of ensuring the protection of the public interest through effective control of surface coal mining operations.

I see no statutory language supporting OSM's list of services it provides to identifiable private recipients where a fee may be appropriate. It may be understandable that OSM is suffering from



some identity problems. During the last year it has undergone at least four shifts in top management. However, to the best of my knowledge, the name of the agency is still the same. The agency is called the Office of Surfacing Mining, not the Office of "Service" Mining. And I suspect the mining companies are not confused by this basic point.

I think it's well known that the OSM is a regulatory agency and not a service agency, and the OSM is not providing a service to any coal company by administering a stringent environmental statute through a rigorous permit process. It is, in fact, regulating the coal company for the benefit of society and the environment.

I guess regulation, of course, these days is often regarded as a four-letter word, and it may be easier to talk about services which are provided by the Federal action. However, I don't think that rhetoric changes reality. OSM cannot merely call regulation services and expect to fool anyone paying for the so-called benefit.

I have also heard arguments in support of OSM's proposal which reference a provision in the Federal law authorizing the regulatory authority to set a permit fee pursuant to an approved State program or a Federal program. Wyoming has an approved State program and has the regulatory authority under the law. I see no authority for OSM to institute a separate permit fee. Furthermore, I see no authority for the imposition of a mine plan fee inasmuch as the Federal Lands Program is not recognized under the permit fee provision.

The proposed rules, I think, also threaten to undermine State primacy. The rules would assess two separate fees for operators on Federal lands in cooperative agreement States. OSM could recover its costs for all permitting functions required under a cooperative agreement and would recover an additional cost relating to mine plan approval.

This subcommittee, I believe, should realize that State primacy still eludes the West under the court decisions which require a dual system for approving coal mining on Federal lands. OSM's rules would now heap insult on injury of duplication. Coal operators would be required to pay for duplicative services, reviews, increasing the pressure to eliminate the State's role in regulating mining on Federal lands. I firmly believe that such a result would be at the ultimate expense of the Federal Government, at the expense of industry, and at the expense of one of the best environmental programs in the Nation.

I also question whether the proposed rules make any sense, even if they were specifically authorized by law. Several ironies, I think, become apparent when considering the rules. The first irony is that the most efficient coal operators in the Nation, those in the West on Federal lands, will finance the activity of one of the most inefficient, complicated bureaucracies in the Federal system.

OSM has not been successful in making its bureaucracy function effectively. The Western States have recommended that OSM delegate decisionmaking to the field. However, OSM has centralized decisions more than ever in Washington. States must consult the field office on decisions, starting at the bottom tier and working up. However, the decision eventually comes to Washington, again starting at the bottom tier, with an additional layer to reflect the

ever-present Solicitor's office. The system should be made more efficient before we ask private industry to finance its management practices.

As you may know, OSM rules have been remanded by court decision. Wyoming's cooperative agreement has been pending before OSM for over 2 years. And I think it's a sad reflection that OSM is now ready to move on the cooperative agreement and I'm ready to terminate it. We also face delays on State program amendments with the absence of corresponding Federal requirements in certain areas. And I guess I'm beginning to feel just like I flunked the second grade because the teacher's pet never learned how to read. Again, I strongly believe that fairness demands some order to this house before private industry finances its operation.

I also question as to whether or not the proposed cost recovery rule would result in a net gain for the Federal Treasury. The rules look toward the institution of a detailed accounting system to monitor the costs for reimbursement. The Federal Government's track record on collecting money is pretty poor. OSM's record is abysmal. Government reports charge that OSM has failed to collect over \$150 million in past fines from coal companies. Other reports allege that OSM has spent over \$1.5 million on a computer system that doesn't work.

In short, accurate or not, OSM is beset by allegations of mismanagement, inefficiency, and waste. And I would recommend that OSM attend to the penalty and regulatory systems which Congress and the courts expect it to administer and not propose a new, expensive initiative of questionable value with additional administrative responsibilities.

The final irony, I think, of all of this is that the rule would authorize OSM to waive permit fees over \$500 for small operators. While I appreciate the interest of minimizing expenses for small business, the costs which OSM would be recovering relate to the regulation of mining. If any group needs to understand that the Surface Mining Act regulates mining, it's the group composed of small operators.

For the record, Mr. Chairman, I am attaching a recent article from the Washington Post, and with all due deference to Senator Ford, it describes the scars and the marks in Kentucky created by illegal activities of small operators. And I find it ironic that OSM proposes to penalize the larger companies who concededly do better reclamation and apparently forgive both permit fees and reclamation for small operators.

My final point relates to the disproportionate effect of the proposed rule on coal mining operations conducted on Federal lands. Generally speaking, under OSM's proposed rule, once a State receives program approval, all permit fees are a matter of State law, rather than Federal regulation. However, where a cooperative agreement is in effect for the regulation of mining on Federal lands, the mining applicant must still remit a fee to OSM without regard to State law or State primacy.

And I believe that this proposed rule is clearly contrary to the act's intent to help ensure fair competition in interstate commerce among sellers of coal produced in different States. Federal coal will bear the costs of OSM.

During difficult economic times, Wyoming cannot afford to ignore any proposal which would add costs to the values of Federal coal. While Federal coal production remains high, the value of production is declining. I've attached a chart to my statement which is a report from the Federal Coal Management Committee of the Department, depicting the drop in the value of coal.

It would seem to me that external cost increases which are not borne by all coal regions will be extremely difficult for our coal producers to absorb in a competitive market of declining prices. I would ask that this subcommittee consider whether Federal coal is losing the ability to contribute its share toward the national goal of increased coal utilization and enhanced self-sufficiency.

Mr. Chairman, this concludes my remarks before the subcommittee today. I would like to offer a letter into the record which reflects the opposition of other western coal producing States to the proposed permit fee rule.

Senator WARNER. Without objection.

Governor HERSCHLER. I would be more than happy to respond to any questions you may have.

[The prepared statement of Governor Herschler follows:]

Remarks by  
The Honorable Ed Herschler  
Governor of Wyoming

Before The  
Subcommittee on Natural Resources  
Development and Production  
United States Senate  
Committee on Energy and Natural Resources

Oversight Hearing  
Office of Surface Mining's  
Proposed Rulemaking

Tuesday, July 9, 1985

9:30 a.m.

Room SD-366

Dirksen Senate Office Building  
Washington, D.C.



Good morning Mr. Chairman and distinguished members of the Senate Subcommittee on Natural Resources Development and Production:

I am pleased to appear before you at this oversight hearing and comment on the proposed rule of the Federal Office of Surface Mining, which would establish a fee to recover OSM's costs in processing permit applications and mine plans for surface coal mining operations.

I strongly oppose OSM's proposed rule for reasons which warrant Congressional attention. If finalized, the rule would confuse and frustrate important goals of the Federal Act, heighten agency inefficiencies and problems, and disproportionately impact coal production from federal lands.

On the point relating to the Federal law, I must first question whether the proposed permit fee rule meets the statutory requirement that rules "be necessary to carry out the purposes and provisions of the Act." 30 USC 1211(c)(2). The purposes of the Act are detailed in Section 102. This section clearly reflects the Congressional sentiment that a nationwide program is necessary to protect society and the environment from the adverse effects of surface coal mining operations. In fact, the "full reach of Federal constitutional powers" is brought to the task of insuring the protection of the public interest through effective control of surface coal mining operations.

I see no statutory language supporting OSM's list of "services it provides to identifiable private recipients where a fee may be appropriate." It may be understandable that OSM is suffering some identity problems. During the last year, it has undergone at least four shifts in top management. However, to the best of my knowledge, the name of the agency has not changed. The agency is called the Office of Surface Mining, not the Office of Service Mining. I suspect the mining companies are not confused on this basic point.

This is an important distinction which is distorted by the proposed rule. OSM is a regulatory agency, not a service agency. OSM is not providing a "service" to any coal company by administering a stringent environmental statute through a rigorous permit process. It is, in fact, regulating the coal company for the benefit of society and the environment.

In a political period where "regulation" is often regarded as a four-letter word, it may be easier to talk about "services," which are provided by the federal action. However, in this instance, rhetoric doesn't change reality. OSM cannot merely call "regulation" -- "services" and expect to fool anyone into paying for the so-called benefit.

I have also heard arguments in support of OSM's proposal which reference a provision in the Federal law authorizing the regulatory authority to set a permit fee pursuant to an approved State program or a Federal program. Wyoming has an approved State program and is the regulatory authority under the law. I see no authority for OSM to institute a separate permit fee. Furthermore, I see no authority for the imposition of a mine plan fee, inasmuch as the "Federal lands program" is not recognized under the permit fee provision.

Given that permit fees, as set by the regulatory authority, are specifically mentioned in the Surface Mining Act, an implication arises that no other fees are contemplated or authorized. The proposed rules distort the purposes of the Federal Act and fall short on statutory authority. They should not be finalized.

The proposed rules also threaten to undermine state primacy. The rules would assess two separate fees for operators on federal lands in cooperative agreement states. OSM would recover its costs for all permitting functions required under a cooperative agreement and would recover additional costs relating to mine plan approval.

This subcommittee should realize that state primacy still eludes the West under court decisions which require a dual system for approving coal mining on federal lands. OSM's rules would now heap insult upon the injury of duplication. Coal operators would be required to pay for duplicative reviews, increasing the pressure to eliminate the State's role in regulating mining on federal lands. I firmly believe that such a result would be at the ultimate expense of the federal government, at the expense of industry, and at the expense of one of the best environmental programs in the nation.

I also question whether the proposed rules make any sense even if they were specifically authorized

by law.

Several ironies become apparent when considering the rules. The first irony is that the most efficient coal operators in the nation, those in the West on federal lands, will finance the activities of one of the most inefficient, complicated bureaucracies in the federal system.

OSM has not been successful in making its bureaucracy function effectively. The western states have recommended that OSM delegate decision-making to the field. However, OSM has centralized its decisions more than ever in Washington. States must consult with the field offices on decisions, starting at the bottom tier and working up. However, the decision eventually comes to Washington -- again starting at the bottom tier with an additional layer to reflect the ever-present Solicitor's office. The system should be made much more efficient before we ask private industry to finance its management practices.

The bureaucracy itself is not the only complicated and expensive variable in this process. Under the current situation operators must obtain a permit and mine plan from the OSM "black box," which lacks the federal lands rules, Wyoming's revised cooperative agreement, and many substantive permit and reclamation requirements.

As you may know, many OSM rules have been remanded by court decisions. Wyoming's cooperative agreement has been pending before OSM for over two years. It is a sad reflection that OSM is now ready to move on the cooperative agreement, and I'm ready to terminate it! We also face delays on State program amendments with the absence of corresponding federal requirements in certain areas. I am beginning to feel like I just flunked second grade because the teacher's pet never learned to read. Again, I strongly believe that fairness demands some order to this house before private industry finances its operation.

I also have to wonder whether the proposed cost recovery rule would result in a net gain to the federal Treasury. The rules look toward the institution of a detailed accounting system to monitor the costs for reimbursement. The Federal government's track record on collecting money is poor. OSM's record is abysmal. Government reports charge that OSM has failed to collect over \$150 million in past fines

from coal companies. Other reports allege that OSM has spent over \$1.5 million on computers that do not work.

In short, accurate or not, OSM is beset by allegations of mismanagement, inefficiency, and waste. I would recommend that OSM attend to the penalty and regulatory systems which Congress and the Courts expect it to administer, and not propose a new, expensive initiative of questionable value with additional administrative responsibilities.

The final irony is that the rule would authorize OSM to waive permit fees over \$500 for small operators. While I appreciate the interest of minimizing expenses for small business, the costs which OSM would be recovering relate to the regulation of mining. If any group needs to understand that the Surface Mining Act regulates mining, it is the group composed of small operators.

I am attaching a recent article from the Washington Post which describes the scars and pockmarks in Kentucky created by the illegal activities of small mining companies. I find it ironic that OSM proposes to "penalize" the larger companies that concededly do better reclamation, and apparently forgive both permit fees and reclamation for small operators. The "nationwide program" appears to have fundamentally different features for different operators, not unlike the situation before the law was enacted.

My final point relates to the disproportionate effect of the proposed rules on coal mining operations conducted on federal lands. Generally speaking under OSM's proposed rule, once a state receives program approval all permit fees are a matter of state law rather than federal regulation. However, where a cooperative agreement is in effect for the regulation of mining on federal lands, the mining applicant must still remit a fee to OSM without regard to state law or state primacy.

This proposed rule is clearly contrary to the Act's intent to help insure fair competition in interstate commerce among sellers of coal produced in different states. Federal coal will bear the costs of OSM's frequently inefficient and duplicative activities while mining on private and state lands will avoid the costs altogether.

During these difficult economic times, Wyoming

cannot afford to ignore any proposal which would add costs to the value of federal coal. While federal coal production remains high, the value of production is declining. I am enclosing some charts from the 1984 Federal Coal Management Report of the Department of Interior, depicting the drop in coal value.

External cost increases which are not borne by all coal regions will be extremely difficult for our coal producers to absorb in a competitive market of declining prices. I would ask that this Subcommittee consider whether federal coal is losing the ability to contribute its share toward the national goal of increased coal utilization and enhanced energy self-sufficiency.

This concludes my remarks before the Subcommittee today. I would like to offer a letter into the record which reflects the opposition of other western coal producing states to the proposed permit fee rule.

I would be more than happy to respond to any questions which you may have at this time.



## Strip Mining Is Alive and Well, but Mountainsides Aren't

Companies ignore the law  
on repairing the land

By Bill Peterson  
Washington Post Staff Writer

**D**WARF, Ky.—Eight years ago, a long-sought federal strip mining bill became law. Today almost no one is satisfied with the results. Not the environmentalists, who pushed for the controls. Not the coal industry, which opposed them. Not the politicians, who voted for them.

Most of all not Sidney Corbett, a retired Army major who lives here.

"The mountaintops are changing," he said as he stood on a hillside above his home. "Every time I come up here, things look worse."

Into the distance, ridge after ridge bore the marks of strip miners' bulldozers. Some were ringed with deep, 15-year-old scars; other mountaintops looked as if they had been decapitated. Here and there, new trees and grass grew on slopes refashioned by strip miners after the coal had been mined, examples of the kind of reclamation envisioned in the law.

But the patches of green were far outnumbered by new, unreclaimed pockmarks on the hillsides, spilling ugly piles of rubble down the slopes.

"I think the whole reclamation program is a farce," said Corbett, 49, who fought a three-year battle to keep a coal company from strip mining his property under a "broad form" deed, in which his grandfather sold the mineral rights on the family land a half-century ago.

He lost. His land, once heavily wooded with poplar and beech trees, looks like a moonscape, ugly and barren.

Thousands of acres on Appalachian mountainsides have suffered a similar fate the past eight years, the result of lax enforcement, bureaucratic bungling and outright lawlessness by segments of the coal industry.

Hundreds of coal companies have ignored federal orders to repair damage to land and water. Scores more have found ways to circumvent the law.

Federal officials have told Congress that 6,000 unreclaimed strip mines have sprung up since 1978. Some environmentalists say the number may be twice that.

In places like eastern Kentucky and southwestern Virginia, the abuses have become so widespread that they overshadow progress in reclamation practices by many companies and raise serious questions about the law's effectiveness.

"Everywhere I look I see problems, and the most troubling thing I see is that the problems are getting worse, not better," says Democratic Rep. Morris K. Udall of Arizona, an author of the law. "Reports of abuses of both the letter and spirit of the act grow almost geometrically. The entire strip-mine program, in my view, is in trouble."

The Interior Department's Office of Surface Mining, set up to oversee the law, is beset by allegations of mismanagement, inefficiency and waste. During the last year, it has been investigated by two House committees, the Internal Revenue Service and the General Accounting Office. It also has undergone four shifts in top management.

A report by the House Government Operations Committee, a year ago, charged that

OSM had failed to collect \$152 million in back fines (the amount has since risen to \$200 million), spent \$1.5 million on computers that do not work and encouraged violations of the law by failing to establish itself as "a credible regulatory agency."

OSM has collected \$1 of every \$10 it has assessed in fines, the report said. "Inordinate delays, and in some cases complete breakdowns... have delayed cases so long that there is little hope of collecting most of the \$150 million in penalties owed by coal operators."

Under the law's enforcement scheme, OSM policed the coal fields until the 24 coal states rewrote laws to conform with national standards. As states took over, OSM retained an oversight role, an arrangement that one Interior Department official described as "difficult at best."

State enforcement has been uneven, and in Tennessee and Oklahoma, OSM has resumed control. A recent OSM review of enforcement in Kentucky found that state inspectors cited only one violation in 14, were "inconsistent" in levying fines and had not developed an effective way to deal with repeat offenders.

"Enforcement has broken down. Responsible companies are looking like fools for spending the money it takes to do a good job of reclamation," says Thomas J. Fitzgerald, a Frankfort, Ky., attorney who represents environmental groups. "There's no incentive built into the system to do a good job."

Industry spokesmen say a growing number of wildcat operators ignore the law, sometimes strip mining land they do not own.

"They're a new breed. They have no regard for the law or anyone. It got so bad for a while I thought we had the Mafia in here," says Richard Corbett, longtime land agent for BethEnergy Mines Inc., a subsidiary of Bethlehem Steel Corp., in Jenkins, Ky. "They don't pay severance tax. They don't pay income tax. They don't reclaim the land. They don't pay for their coal. A legitimate company can't compete with them."

**C**orbett says he and other land agents repeatedly have been threatened with death by wildcaters illegally mining BethEnergy land.

"I'll face a man down with a gun, but when they call you at home that's something else," he says. "One of them knew all about my boy. Where he went to school. When he came home. He said I wanted to see that boy stay alive I better fuck off."

"You get five days after a while. We're not getting combat pay."

Corbett estimated that 30 such wildcaters operate in his area, often working nights or weekends to avoid detection. "They come in, load up 3,000 to 4,000 tons of coal over the weekend and disappear," he says. "At \$30 a ton, that's a pretty lucrative business."

Legitimate operators who evade the law have been a far greater problem than wildcaters. Records indicated that scores of coal companies, including subsidiaries of some of

the nation's largest corporations, have exploited its exemptions.

Some firms have claimed that they were exploring for coal, not mining it. A spot check of 1,800 "exploration" sites in Kentucky by OSM found that one-third were strip mines.

Still other coal mine operators, perhaps as many as 1,500, according to environmentalists' estimates, have forfeited bonds required to guarantee that reclamation takes place and abandoned sites because it is cheaper to forfeit the bond than carry out the required reclamation.

The most frequently exploited loophole has been an exemption designed to allow "pick-and-shovel" mom-and-pop operators to strip mine 3-acre tracts of their land.

An estimated 2,700 3-acre sites in Kentucky and Virginia have been strip mined and abandoned with little reclamation under the exemption. Many now look like areas strip mined before the law was enacted. They have large exposed cliffs or "highwalls" prohibited on larger sites, poor drainage control, little vegetation and piles of rubble slipping down the hillsides.

The 3-acre thing has gotten completely out of hand. It's a black eye on the whole industry," complains Victor Childers, president of Coal Operators & Associates, an industry association in Filmore, Ky. "We all, in effect, are paying for their sins. It gives the whole industry a bad name."

Of 944 such permits granted in Kentucky during 1984, 70 percent violated state or federal law, according to a new OSM report.

Some firms have put together a series of 3-acre permits in a "string of pearls" to allow them to strip mine large areas, according to L. Thomas Galloway, a Washington attorney who has represented environmentalists in a series of successful suits against OSM. Others have created "shell companies" to take out permits on adjoining pieces of land, he says; the separate companies share equipment, employees, officers and stockholders.

James Garrison, president of the Hardy Able Coal Co., says many companies have been forced to circumvent regulations, which he claims are overly stringent. It is a matter of economic survival, he says.

"In my heart I don't want to break the law. We're not raised like that in this part of the country," he said in an interview in his Manchester, Ky., office. "But if you're in the coal business, you inherit a system that makes you. It's almost like you are breaking the law before you get out of bed in the morning."

"Yes, we were playing with the earth. But we've been putting the mountains back together. We love the environment as much as anyone. Our forefathers came to this land 150 years ago, and we want to protect it."

Hardy Able was charged with violations at two strip mines in 1978 and ordered to cease operations. When the violations were not corrected, the company was assessed \$814,600 in fines.

Yet, according to OSM reports, it continued to obtain dozens of permits through a series of related companies with colorful names like Sugar Creek Coal, Little Goose Coal, Rooster Branch Coal and G.R. & Co. All were controlled by members of Garrison's family, the reports said, and all used the same equipment to work the mines.

"What would you do? Go broke and tell the people who you owe \$1 million that you're sorry?" Garrison asks. "You know what you'd do. You'd keep working any way you could. That's what we did."

OSM has gone to court in an attempt to make Hardy Able pay back fines. The company, Garrison alleges, has been singled out because "we aren't big enough to have enough political clout."

"We just can't understand the intent of the federal strip-mining law," Garrison adds. "All the law did was take the coal business from people like my family and put it in the hands of a few big corporations."

"There's a reason we don't pick on the big companies," says W.H. Tipton, head of OSM's Kentucky office. "They [Hardy Able] do business in a different manner than the big companies. The big companies do a higher level of reclamation."

The strip-mine law has been embroiled in controversy from the start. The product of years of bitter congressional struggle, the measure was vetoed twice by President Gerald R. Ford before President Jimmy Carter signed it, saying he wished it were tougher.

The coal industry considered Carter's OSM appointees "scalots," bent on regulatory excess. President Reagan's first interior secretary, James G. Watt, vowed to change the agency.

Hundreds of pages of regulations were rewritten; 470 of OSM's 948 employees resigned, retired or were fired within six months; five regional offices were closed.

Now, four years later, all the policymakers who came in with Watt are gone from OSM, and many regulations are being rewritten a third time. Acting OSM director Jed B. Christensen became the fourth head of the agency in 13 months when he succeeded John D. Ward, who resigned in April.

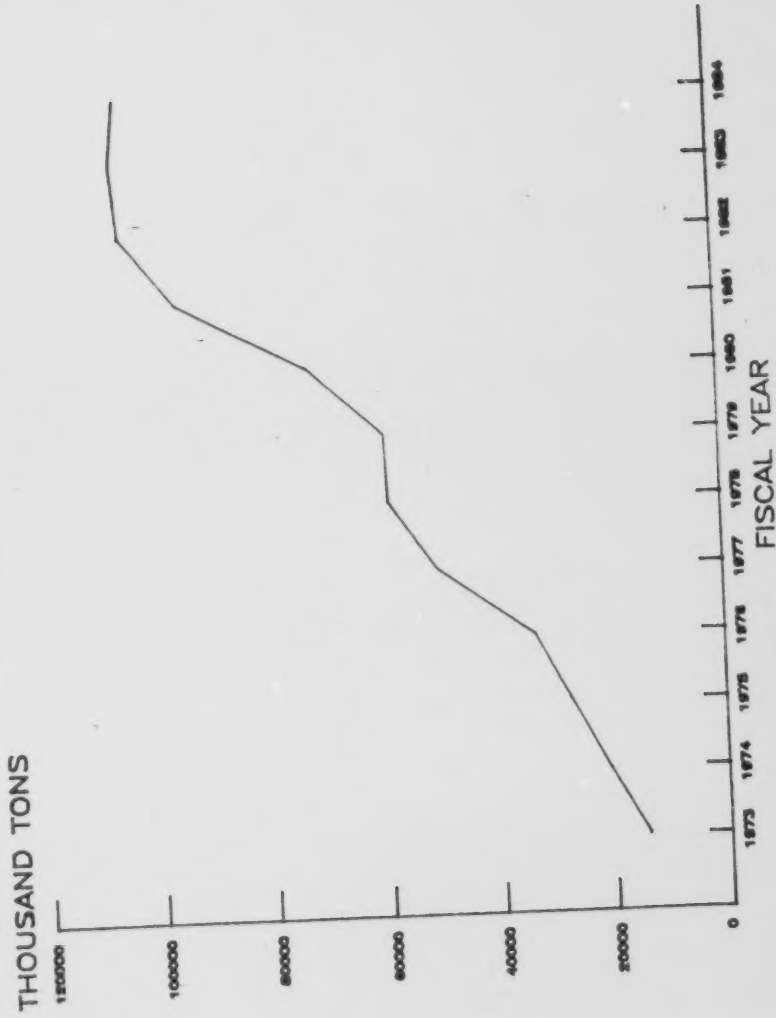


# **Federal Coal Management Report**

**Fiscal Year 1984**

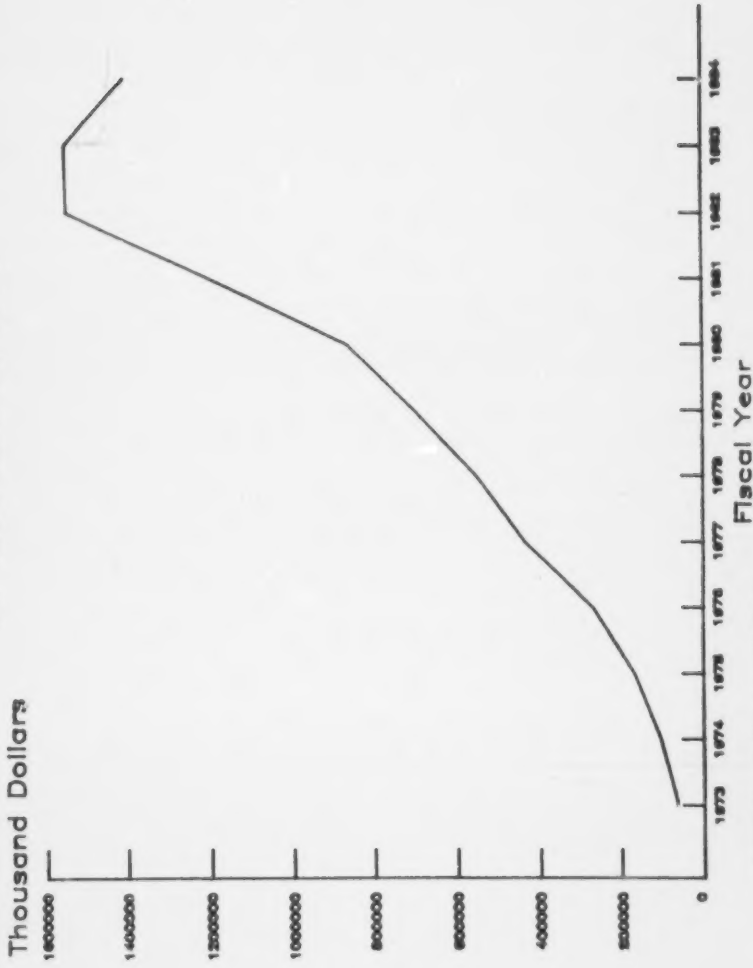
Annual report of the Secretary of the Interior under  
Section 8 of the Federal Coal Leasing Amendments Act of 1976  
(P.L. 94-377)

Figure A-9  
**Production from Federal Coal Leases**  
 FY 1973 thru FY 1984



SOURCE: Energy Management Office, Dec. 1984

Figure A-8  
**Value of Production—Federal Coal Leases**  
 FY 1973 thru FY 1984



SOURCE: Energy Management Office, Dec. 1984.





STATE OF WYOMING  
OFFICE OF THE GOVERNOR  
CHEYENNE 82002

ED HERSCHLER  
GOVERNOR

April 25, 1985

Honorable Donald Paul Hodel  
Secretary of Interior  
U. S. Department of the Interior  
18th and C Streets, N.W.  
Washington, D.C. 20240

Dear Mr. Secretary:

The Department of the Interior proposed regulations on February 22 requiring permit fees to cover the cost of various activities of the Office of Surface Mining (OSM). The thrust of the proposed regulations seems to be patterned after a draft report by the General Accounting Office--a report which has received much criticism.

On November 22, 1984, I joined with my colleagues from other western coal producing states in roundly criticizing the draft GAO report. Today, I again join with my fellow governors from Utah, Colorado, Montana, and New Mexico, and the Public Service Commission of North Dakota in taking strong exception to the regulations proposed by OSM on permit fees. The proposed regulations should be rejected.

While the principle of recovering government costs from the beneficiaries of government action has many valid applications, OSM's application of this principle to mine regulation is inappropriate. Recovery of costs should be based on an understanding of who is the beneficiary of mine regulation or the public policy and public interest served. The recovery of cost for government regulation of mining is not comparable to the recovery of cost for other types of government services, such as Coast Guard rescue or navigation aids for yacht owners. The externalities of mine regulation, such as improved wildlife habitat and agricultural lands, new cultural resource discoveries, new impoundments or solid waste disposal facilities created for others' benefit, should be included in the proposed rules.

The proposed rules shift the financing of mine regulation. To implement the rules, an extensive cost accounting system will have to be developed. We question whether

Honorable Donald Paul Hodel  
 Page 2  
 April 25, 1985

society will receive a net benefit from this expensive cost shifting proposal.

OSM intends to selectively apply its cost recovery program to certain OSM expenses associated with federal mine plans, federal coal exploration and federal programs in states without programs. By this logic, OSM should recover costs associated with processing of unsuitability petitions, OSM's payments of attorney's fees, state program oversight, federal inspections, etc. This would also be unacceptable. The proposed rules also limit cost recovery to larger mines, since small mines would have to pay no more than \$500. The net effect is that the proposed rules hit particularly hard on coal operations in the West--operations which for the most part are well run and in full compliance with SMCRA.

While the proposed rules selectively hurt western states, the rules also leave the door open for OSM to charge all operators throughout the nation for OSM's inefficient activities. Most disturbing, perhaps, is the proposal in the rules to charge operators on federal lands for two reviews of the same mine plan. The problem of OSM duplication of state reviews on mine plans on federal lands is a recurrent one as the states' experience, recent litigation (In Re: Permanent Surface Mining Litigation), and OSM's FY 86 budget proposal confirm. The proposed permit fee rules compound the error of duplication of state work by OSM, charging the operator for OSM's duplication.

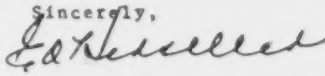
In the competitive coal industry today, western operators cannot afford to be paying for duplication of state regulatory activities. I suspect that if OSM insists on charging for the duplication of state work on federal mines, some western states will decide to terminate their cooperative agreements and let OSM regulate those mines. In some states, such as Wyoming which is the third largest coal producing state, federal mines account for well over 90 percent of production. And, as has been shown in Tennessee, when OSM takes over a state program, OSM's cost for such regulation is several times higher than state costs due to inherent inefficiencies.

The permit fee proposal also highlights another troublesome area for some western states; OSM's insistence on a separate mid-term permit review. Some states, such as Wyoming, perform annual reviews of five year permits--well in excess of the mid-term reviews contemplated by the Surface

Mining Act. Under the proposed rules, operators would not only continue to be subject to an additional, unnecessary mid-term review by OSM, but they would be charged for this burdensome and duplicative review.

For these reasons, western states urge you to direct OSM to reject the proposed regulations.

Sincerely,



EH:np

cc: Honorable Morris K. Udall  
 Honorable James A. McClure  
 Honorable Sidney R. Yates  
 Honorable Mike Synar  
 Acting Director Jed Christensen  
 Administrative Record, Room 5315

Senator WARNER. Thank you, Governor.

First I yield to the Senator from Wyoming to lead off.

Senator WALLOP. Good morning.

Governor HERSCHLER. Good morning, Senator.

Senator WALLOP. I'm glad to see you here and I'm glad to receive that statement. While you are, by your statement, on the threshold of wishing that you did not have a cooperative agreement with OSM, assuming back to a level playing field, the way you thought it was going to be when you entered into that agreement, could you describe what benefits, if any, there would be with a State cooperative agreement?

Governor HERSCHLER. Senator, we do have a cooperative agreement. We have been attempting to get it amended for a period of time under the new rules to allow us more latitude, and that has been pending for almost 2 years. We theoretically have a cooperative agreement at this point, but it is more stringent, of course, than the limitations or the latitudes, if you will, that have been allowed under the OSM Surface Mining Act.

We cannot get the people to act on this. We find now that they may be, and of course, we're just about at the point where we're about to let them have it.

Senator WALLOP. Let them operate the——

Governor HERSCHLER. Yes.

Senator WALLOP. Is there a circumstance now that many of our operators face, where they have to serve two masters, sometimes in conflict with one another?

Governor HERSCHLER. Well, yes, Senator, because we do have—much of our land in Wyoming, although the Federal Government owns about 72 percent of the mineral interests, there is a considerable amount of coal on State lands and on private lands which we feel that our Department of Environmental Quality must also regulate.

And when you put a mining plan together, ordinarily you have State lands, Federal lands, and fee lands all together. And so it's an integral mine plan, but here we have the OSM who says we've got to regulate the Federal lands, and of course, we think we have a pretty good environmental quality law in Wyoming, and it's going to amount to duplication with additional fee, which I don't think the mine operators should be subjected to.

Senator WALLOP. They sure don't need it now, given the marketplace that exists.

Governor HERSCHLER. We don't think so, sir.

Senator WALLOP. If these regulations were to come into effect, how would you characterize its effect on Wyoming's coal industry or western coal industry in general?

Governor HERSCHLER. Senator, I have seen the GAO report which indicates that it would—that the costs for the mining of coal would be minimal by these additional fees.

First of all, I don't have much faith in the figures the GAO uses because I don't think that OSM has a proper accounting system to show what those costs would be at this point in time.

Then, second, you're imposing additional costs on Federal coal—and that's where most of the Federal coal is—in the West—there's very little Federal coal east of the Mississippi. And so that even if

it's 10, 12, 15, or 20 cents a ton, that still hurts the competitiveness of western coal in the market, and I would suspect also in imported coal that the Senator discussed in his opening statement.

Senator WALLOP. Overall, I mean there seems to be no benefit and a great increase in complication and a great increase in cost.

Governor HERSCHLER. I think it would be very detrimental for competitive actions by the coal operators; also increase the price of coal. Our transportation costs now are such that we're losing a lot of our contracts primarily because of transportation costs. And the coal people in Wyoming I think are probably as efficient as any operators in the country. We do have good environmental quality and our permitting fees, if they add fees on this, would just be duplication.

Senator WALLOP. Mr. Chairman, I want to thank Governor Herschler for this statement. And I hope that those from the administration who are here heard what he had to say, because it's a reasoned statement about what it does to the coal industry, and it's also reasoned as to how it appears not to fit with Congress' intent when it passed the Surface Mining Act.

I doubt that Wyoming considers its regulation of environmental quality at any level, whether it's surface mining or air quality or anything else, as a service provided to companies, but as an obligation to its people. And I think maybe that's a piece of western commonsense that I wish OSM would pick up and listen to.

Senator WARNER. I thank the Senator from Wyoming. I concur in his observations. I thank the Governor for coming and making this long trip to be here today, but it's one of great importance not only to Wyoming, but other Western States.

In my judgment you framed the issues clearly, succinctly, and that enables this subcommittee now to proceed with its work. I think that work may well be along the lines as outlined by the Senator from Wyoming.

Senator Ford.

Senator FORD. I have no questions of the Governor, Mr. Chairman. I do thank him, as the Senator said, for his very good statement.

Governor HERSCHLER. Senator, I would like to clarify one matter that's in the GAO report, and you may hear this—the fact that we have an Industrial Siting Act in Wyoming. The GAO report reflects on that, saying that we are now charging large fees through our Industrial Siting Administration. And that's not entirely correct, sir, and I wanted to explain that while I'm here this morning.

Before the Industrial Siting Commission or Council grants a permit under that particular act—and we look at large operations such as coal mines, powerplants. We've just permitted a fertilizer plant; we've just permitted a gas sweeping plant. There are three permits that are required before the Industrial Siting Council gets involved. If it's a powerplant, for example, they must get a permit from our Public Service Commission, a certificate of convenience and necessity to sell electricity, if you will.

We also have a State archaeologist who looks at the place, and if there are archeological phenomena somewhere, and he will not grant a permit, that's the end of the application.



Then, of course, they go through the four departments of our Department of Environmental Quality: Air, Land, Mine Reclamation and Land Division, and Solid Waste Management. If they do not give a permit, then it does not go on—they do not review those.

The Industrial Siting Council, Senator, the primary purpose of that is a coordinating body between those three particular agencies and also is used for the mitigation of socioeconomic impact. In other words, if there is a new mine opening and there are going to be 300 miners there, whether or not they have housing, whether the city can provide sewer water, et cetera. And they do charge some of the costs in working out that arrangement, which has nothing to do really with the actual permitting of the mine itself.

Senator WARNER. Thank you for that important clarification.

Governor, we will keep this record open for 2 weeks to enable you, if you so desire, to supplement your comments and perhaps respond to some of the statements that will be made by witnesses following your testimony.

Governor HERSCHLER. Thank you, Senator.

Senator WARNER. Thank you very much.

Governor HERSCHLER. May I also say that my remarks about the Office of Surface Mining apply to everything except present company—Mr. Christensen. I think he's doing the very best he can.

Senator WARNER. Thank you. I hope you have a safe journey back home. You represented your constituents well this morning—and others.

We'll now hear from the Acting Director, Office of Surface Mining, Mr. Jed Christensen.

#### STATEMENT OF JED CHRISTENSEN, ACTING DIRECTOR, OFFICE OF SURFACE MINING, DEPARTMENT OF THE INTERIOR

Mr. CHRISTENSEN. Mr. Chairman, it's a pleasure for me to be here today to talk about this OSM proposal on cost recovery. I commend the chairman and this committee for looking into this area, an area where consensus will be crucial and everyone is going to have to have their comments considered.

It is for that very purpose that we've extended the comment period to take into consideration any comments that may be made today at this hearing.

With your permission, I'd like to just briefly summarize my testimony and submit the full text for the record.

Senator WARNER. Without objection.

Mr. CHRISTENSEN. Thank you.

At the outset of my testimony, I'd like to be clear about our purpose with this proposal, and to deal with any concerns that people may have that it would create a burden on the coal industry.

The economic issues surrounding the rule proposal are crucial. It's a matter of record that the coal industry has serious economic problems—sluggish demand, overcapacity, and the need to seek new capital for new ventures. On top of all that, domestic coal producers at present face a future of slim growth, uncertain freight rates, and a deteriorating export business.

Some analysts go on to say that the industry's competitive edge is somewhat blunted. This administration recognizes that, but real-



izes, as does the industry, as economic expansion continues in this country, coal is one of the best hopes for restoring our energy security.

I am very acutely aware of these economic perspectives when reviewing the content and implications of our proposal. At this time I recognize that relief from burdensome overregulation has been and continues to be a key ingredient in the administration's program for economic expansion.

Even more to the point, I believe that we have to remember when we develop this permit fee, that there are certain purposes of the Surface Mining Act and there's one part I would like to quote, which says: "We need to assure that the coal supply essential to the Nation's energy requirements, and to its economic and social well-being is provided, and strike a balance between protection of the environment and agriculture productivity and the Nation's need for coal as an essential source of energy."

Another point I'd like to make—and this is a very important point, I believe—is that our cost recovery proposal is not by any means intended to circumvent State primacy. We believe that SMCRA, the law itself, works best under State primacy, with the States themselves processing permit applications.

Under our proposal, we would propose to recover costs dealing with very specific items which I would like to reiterate. That is, we would recover costs on Indian and Federal lands, on Federal lands in States where there is not a cooperative agreement. We would recover costs for review of mining plans in States with cooperative agreements, and we would recover costs in States where we are the Federal regulator.

In other words, the proposal is very limited and it does not require States to establish similar fee schedules.

Against this brief background, we are very willing to consider constructive arguments or views and facts that will help us assess the economic impacts of this proposal. The economic impacts of this proposal have been highly criticized by many of the commentators, and it is our aim to resolve these issues in an equitable fashion.

Let me briefly highlight and clarify the major provisions and issues of this proposal. The authority, first of all to collect fees, comes from two areas. One is the law itself—SMCRA—and the second area is the Independent Offices Appropriation Act of 1952. As pointed out earlier, we propose to recover costs only where OSM has specific review responsibilities.

The fees themselves have been much in dispute from the commenters. In checking our fees and in establishing an accounting system over the last year, roughly the figures are, for eastern mines, a permit fee would cost anywhere from \$12,000 to approximately \$31,000. However, western mines are much larger and their costs would be somewhat larger because it also includes mining plan reviews. These are estimated in our western tech center to range from \$37,000 to over \$110,000, with an average fee of around \$60,000. Of course, where an EIS is required, the costs could be substantially more than that.

There has also been a concern about whether the company or the public benefits from the collection of fees, and I am hoping that

from the record today and from the statements by the witnesses we can clarify this issue more carefully.

OSM's proposal is independent of the GAO audit. I'd like to make that clear. The OSM has been working on a fee structure or a proposal such as this for over 5 years. And it just so happened that this was issued at the same time that the GAO report came out. We have not taken a firm position on the GAO report because we are still in the process of studying that report. However, I'd like to make clear that to the extent the GAO proposal would adversely affect State primacy, we would have serious concerns.

We believe that State primacy is one of the cornerstones of the law, of SMCRA, and that any action that might threaten primacy must be received and reviewed with great care.

Senator Warner, we are very positive that we can, through these hearings and through cooperative effort and listening to everyone involved, resolve this complex and sensitive issue. You have my assurance that the permit fee rule will reflect that balance called for in the law and will include consideration of the full record.

Thank you very much. And I am more than happy to answer any questions that might be asked.

[The prepared statement of Mr. Christensen follows:]

Statement of Jed Christensen  
Acting Director  
Office of Surface Mining Reclamation and Enforcement  
before the  
Subcommittee on Natural Resources Development and Production  
Senate Committee on Energy and Natural Resources  
July 9, 1985

Opening Remarks

Mr. Chairman, thank you for this opportunity to discuss the Office of Surface Mining's (OSM) proposed rules governing the collection of permit application fees. I appreciate both your attention to this important issue and your continuing interest in OSM.

Today I would like to briefly describe what OSM has proposed and to clarify some of the points public commenters have raised.

OSM's PROPOSED RULE

The proposed rule would govern the collection of fees for processing permit applications to conduct surface coal mining and reclamation operations, for processing permit applications to conduct coal exploration, for processing mining plans, and for other services including reviews and revisions to surface coal

mining and reclamation permits. Applicants would reimburse OSM for the actual cost incurred by the Interior Department in providing these services.

The rule would apply to permit applications for mining on Indian lands, in the Federal Program States (Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington), and on Federal lands in States not having State-Federal cooperative agreements. In short, it would apply in those cases where OSM is the regulatory authority. The rule would also require payment to the Interior Department for costs incurred to review and approve mining plans submitted to comply with the Mineral Leasing Act.

On February 22, 1985, the proposed rule was published in the Federal Register. The notice included the dates, times, and locations for public hearings and announced a public comment period closing on May 3, 1985. We have held hearings in Denver, Colorado; Olympia, Washington; and Washington, D.C. A total of 15 witnesses testified. On June 19, 1985, we announced in the Federal Register that we were reopening the public comment period on the proposed rule until July 26, 1985.

ISSUES

As a result of the public comments and hearings that have been held since the proposed rule was published, issues have been raised which indicate a need to clarify certain aspects of our proposal.

Authority to collect fees for permit application related services comes from two sources: the Independent Offices Appropriations Act of 1952, which covers Government-wide cost recovery, and the Surface Mining Control and Reclamation Act of 1977 (SMCRA), which deals specifically with a regulatory authority's responsibility to collect fees for permit applications. The proposal combines these two authorities in one rule to cover cost recovery for all permit and permit related activities.

The issues I would like to clarify are: the scope of activities identified in the rule which could be subject to fees; the mandatory nature of permit application fees; the inclusion of permit-related services in the fee structure; the typical costs applicants can expect; the identification of beneficiaries; and the relationship between our proposed rule and the recently released General Accounting Office report.

- (1) Scope of Cost Recovery: OSM proposes to recover costs incurred in processing applications where OSM is the permitting entity. On Indian lands, on Federal lands in States lacking



cooperative agreements, and in Federal program States, OSM is the permit issuing entity. The principal areas affected are the ones where OSM is the regulatory authority.

There are other circumstances in which the Interior Department conducts a review or renders an approval. The rule as proposed would cover these as well. For example, in States having a Federal-State cooperative agreement, the approval of a mining plan (where leased Federal coal is involved) cannot be delegated to the State, nor can the Secretary of the Interior's responsibilities under a number of other Federal laws. In short, our proposal is to recover the costs the Department incurs.

(2) Fee Mandatory: Some commenters believe that OSM has the discretion to charge or not charge a fee for processing permits. However, the directive for such a fee comes directly from SMCRA.

(3) Services Covered: OSM has proposed to collect fees for services other than just permit issuance. Collection of fees for these services is covered in section 507(a) of SMCRA.

We have included some others as well, such as our proposal to recover the costs of processing mining plans under the Mineral Leasing Act. We believe this is justified because the costs incurred for operators to obtain approval to mine Federal coal are Interior Department costs.

OSM has not included in the proposed rule a specific provision for the collection of a fee for either inspection or enforcement, but has solicited comment on whether and how to do so in the final rule.

(4) Typical Processing Costs: The preamble to the February 22nd (1985) Federal Register notice includes OSM's estimates of typical processing costs. The estimates for eastern mines were given as \$6,000 to \$29,000. We have been gathering cost information since October 1, 1984, and the data collected so far support that estimate. OSM's costs for processing Tennessee permits have ranged from about \$12,000 to \$31,000; data from our Eastern Technical Center in Pittsburgh have been comparable.

(5) Identity of "Beneficiary": A number of commenters have argued that the permit applicant is not the beneficiary of OSM's review, and that the permitting process is hardly a "service" to the industry in any event. Permit approval or denial is a regulatory responsibility assigned to the Office of

Surface Mining under SMCRA. The law, as mentioned earlier, requires the regulatory authority to collect fees in an amount not to exceed the actual or anticipated cost of processing the permit application. The collection of fees by regulatory authorities for licenses and permits is a long-standing practice in the Federal Government.

Even where there are incidental public benefits, the courts have held that the Federal Government may recover costs from regulated industries when services are necessary to the recipient's continuing operation.

(6) General Accounting Office Report: The General Accounting Office (GAO) recently released a report recommending that OSM more fully recover the costs to the government of regulating coal mining. Since we are in the process of studying the final report I am not able to comment on it in detail. One point that needs to be made, however, is that the GAO report and our proposed permit fee rule are independent. The permit fee rule proposes to collect fees for costs incurred by the Interior Department on Federal lands, Indian lands, and in Federal program States. The GAO report recommends recovering costs that are beyond the scope of the permit fee rule.

OSM has been working on the permit fee rule for more than five years. The version proposed in February 1985 was the

culmination of this long developmental process, not something developed as a reaction to GAO in the interim between the release of GAO's draft and the publication of OSM's proposal. Because GAO released its draft only a few months before OSM proposed its own permit fee rule, some persons concluded that we endorsed or adopted GAO's recommendations, and that our February 22, 1985, proposed rule represents the Secretary of the Interior's response to GAO's report. That is not the case.

We are the first to acknowledge, Mr. Chairman, that cost recovery involves complex and sensitive issues. Comments to our proposed rule have raised, and I am sure will continue to raise, many issues which deserve, and will receive, careful analysis. I can assure you that the final permit fee rule will be based upon the requirements of the law and careful consideration of the full record.

Senator WARNER. I would first like to read into the record the statute. Section 507(a) reads: "Each application for a surface coal mining reclamation permit, pursuant to approved State program or a Federal program under provision of this act, is to be accompanied by a fee as determined by the regulatory authority. Such fee may be less than, but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit issued pursuant to a State or Federal program."

It seems to me the key language is "to be accompanied by a fee as determined by the regulatory authority. Such fee may be less than, but shall not exceed the actual or anticipated cost of reviewing."

That imposes a considerably wide latitude of discretion on the Secretary; is that correct?

Mr. CHRISTENSEN. That's right, Mr. Chairman.

Senator WARNER. Now, to what extent did he take into consideration the economic forecasts of the industry for, shall we say, the next 5 years when he made the determination to accept the fee that he has?

Mr. CHRISTENSEN. I believe they've been looking at this fee proposal for a long time.

Senator WARNER. Just go very slowly. Will you start off by telling me everything you know about this proposal.

Mr. CHRISTENSEN. I know that the Secretary—well, there have been three while this has been in the process of being reviewed and proposed. It started out with Secretary Watt, then Secretary Clark, and now Secretary Hodel. We have in the Department reviewed the economic problems that this will cause the industry and are certainly willing to take that into account before we finalize this proposal.

Senator WARNER. You say you're willing to take it into account. It seems to me it would be imperative to take it into account.

Mr. CHRISTENSEN. I agree.

Senator WARNER. What is it in the economic forecasts, in your judgment, or what have you learned from, presumably, your discussions with the Secretary and others, that indicates that the economics of the industry are going to be strong enough for the next 4 or 5 years to sustain this financial burden?

Mr. CHRISTENSEN. That's very hard to predict. And certainly I'm not in any kind of a position to suggest that the coal industry is going to be in better shape in 5 years than they are now.

Senator WARNER. Nevertheless, we're on the high end of the discretionary authority, it seems to me.

Mr. CHRISTENSEN. That's right. The way the proposal was written was to suggest that that is the maximum amount that could be charged. That's simply the proposal, and that's why we're more than willing to listen to comment by anyone who is willing to discuss it with us.

Senator WARNER. We're receiving that comment this morning, and the Governor provided a very clear statement on behalf of his State and others, and that you will take into consideration?

Mr. CHRISTENSEN. Absolutely.

Senator WARNER. Well, I will turn then in my questioning to Senator Ford.

Senator FORD. Thank you, Mr. Chairman.

Let me ask you a question, Mr. Christensen. Is the proposal now to eliminate the 50-50 sharing of reclamation in the various States? Is that the proposal in your rulemaking?

Mr. CHRISTENSEN. Absolutely not. That was part of the GAO recommendation.

Senator FORD. But that's not part of your rulemaking, and you've not accepted that, nor do you intend to go in that direction?

Mr. CHRISTENSEN. No, sir.

Senator FORD. So the 50-50 program as it is now, 50 percent back to the States, and the other 50 percent at the discretion of the Agency or the Department will stay in place. You have no reason to change that?

Mr. CHRISTENSEN. That's true, Senator Ford. In fact, one of the ways that I think we sold State primacy recently was the basis that they would be helped in their reclamation costs.

Senator FORD. How long have you been with the Department?

Mr. CHRISTENSEN. Two months.

Senator FORD. Two months. Now, you don't know—

Mr. CHRISTENSEN. I'm sorry. I have been with OSM 2 months. I've been with the Department 4 years.

Senator FORD. Four years. Are you familiar with OSM over the 4-year period?

Mr. CHRISTENSEN. Having read about it, but I have not worked directly with them.

Senator FORD. You're getting an education, then, aren't you?

Mr. CHRISTENSEN. Steep upward learning curve.

Senator FORD. Sir?

Mr. CHRISTENSEN. I'm on a steep upward learning curve.

Senator FORD. But you're learning fast?

Mr. CHRISTENSEN. I hope so.

Senator FORD. OK.

Governor Herschler said in all deference to Kentucky, he was submitting an article from the Washington Post. I'd like to read two paragraphs of that to you. I thought I remembered it, but I want to read two paragraphs to you.

"The strip mine law has been embroiled in controversy from the start, the products of years of bitter congressional struggle. The measure was vetoed twice by President Gerald Ford before Jimmy Carter signed it. The coal industry considered Carter's OSM appointees zealots, bent on regulatory excess. President Reagan's first Interior Secretary, James G. Watt, vowed to change the agency. Hundreds of pages of regulations were rewritten; 470 of OSM's 948 employees resigned, retired, or were fired within 6 months. Five regional offices were closed.

"Now, 4 years later, all the policymakers who came in with Watt are gone from OSM. Many regulations are being rewritten a third time. Acting OSM Director"—and that referred to you there—"became the fourth head of the agency in 13 months when he succeeded John D. Ward."

How in the world—I've been a Governor and I understand some of the problems with the Federal Government, but I've never experienced anything like this. The yo-yo that you put the States on as it relates to regulation, on and off; people who work for a while



and then they're fired. It just seems like you're never going to get the place straightened out on that basis.

Do you have any plan to stabilize the Department until the States can know what you want and understand the regulations? I understood the Governor to say that you're about ready to sign with him for primacy, and he's about to tell you to take it and go with it, isn't he? Can you give this committee any ray of hope that you're going to level it off so we can understand that there's going to be some stability in the office?

Mr. CHRISTENSEN. Senator, yes, I believe we can. One of the things that has been pretty obvious to myself and the Secretary in discussions with industry and States, environmental groups, and everyone concerned with OSM, if there's one thing they need, it's stability and certainty, and to know where we're going.

And I believe with the backing I have from Secretary Hodel, we can give that kind of stability to the Office of Surface Mining.

Senator FORD. Are you familiar with the laws that were passed by the States so that they might be accepted by the Federal Government under primacy?

Mr. CHRISTENSEN. Yes, sir.

Senator FORD. Are you aware of the fact that OSM said this has to be in the law, and this cannot be in the law, and basically they wrote the law in each State for them to acquire primacy?

Mr. CHRISTENSEN. I believe the Office of Surface Mining was required to ensure that each State's primacy law was at least as effective as the Federal law. Yes.

Senator FORD. So they were at the—say that their representatives and the head of OSM were in the various capital cities of the States saying this law is acceptable, or this isn't acceptable to OSM—and basically the legislature and the Governor had to accept what you said in order to get primacy after a great deal of debate?

Mr. CHRISTENSEN. It's hard for me to go back and criticize those who were there at the time.

Senator FORD. I'm not asking you to criticize. I'm just asking you to say yes or no. Isn't that correct—based on your knowledge?

Mr. CHRISTENSEN. It was pretty much like that, I believe.

Senator FORD. Pretty much like that. I think it was in fact like that. In fact like that.

So if there's any problems with State primacy laws today, it's OSM's responsibility because they basically wrote the laws. So if there are some problems with the States and criticism of the States, then and only then can you correct it. You're the one that has to correct these things. I don't see where you can just make the States a whipping boy. If you write the law and then "big brother" is breathing down their neck all the time.

Mr. CHRISTENSEN. I might suggest, Senator Ford, that the rules and regulations that are adopted by each State are very fluid. And what I mean by that is that they are constantly in a process of amending those. And we're in a position now to make sure that we're not too picky, that we go with a State as far as we can to accommodate their needs.

Senator FORD. Well, when the State changes regulation, do they basically have to comply with yours?

Mr. CHRISTENSEN. Yes.

Senator FORD. Well, how many times have they been changed—this is the third time out, isn't it?

Mr. CHRISTENSEN. That's true.

Senator FORD. Well, how in the world can they stay with you if you're on and off, and up and down? You're on a fast learning curve. The States, they can't perform until you develop regulations, and when they develop them, then they have to respond to it. So they're bound to be behind you all the time. Isn't that correct?

Mr. CHRISTENSEN. Part of the reason we're having these problems right now is, a lot of the rules that were changed at the first of the administration have been remanded back to us by the courts for rulemaking, for revising the rulemaking.

So each time we revise a rule, obviously, the State has to correspondingly do the same thing and come into conformance with that law.

Senator FORD. Thank you, Mr. Chairman.

Senator WARNER. Senator Wallop.

Senator WALLOP. Thank you, Mr. Chairman.

Mr. Christensen, just to follow on that line of questioning for a little bit, the fee is only sort of mandatory, as one reads that section 507(a).

Then in your statement, you say OSM has proposed to collect fees for services other than just permit issuance. Collection of fees for these services is covered in section 507(a). I don't see that. It doesn't mention—well, first of all, it doesn't mention services at all, and second, the only mention is for the permit issuance.

Mr. CHRISTENSEN. The proposal is open in the sense that other fees could be charged for other services that we provide, but no decision has been made on that.

Senator WALLOP. How do you get around to defining it as a service?

Mr. CHRISTENSEN. I think it's debatable.

Senator WALLOP. The problem, I think, as Governor Herschler pointed out, the principal beneficiary of these requirements is not the coal mine operators, but the public. I suppose it's a service if you say, "Unless you do this, I won't let you mine," in a sort of abstract kind of way. But I don't really think that it fits with the overall thrust or the purpose of the passage of the act.

I would hope that they might, before the rules become final, really pay heed to the testimony of Governor Herschler on the part of the western coal States, and our State in particular. It's hard for me to go along—have a permit which is a flexible approach, to which you add the costs of processing the mining plan.

The problem is "other services" is a kind of an open-ended term, too. I mean it's not defined in your statement. Did you have other services or fees in mind?

Mr. CHRISTENSEN. Sir, there are other services we provide, but basically our proposal is suggesting that we stick with the permitting costs.

Senator WALLOP. Well, your statement appears at least to go further than that. "OSM has proposed to collect fees for services other than just permit issuance."

Mr. CHRISTENSEN. Yes. The proposal is open so that other fees could be charged based on public comments, further considerations

that we get from hearings like this, so it doesn't close it off. That's true.

Senator WALLOP. You could understand how people might take some sense of trepidation out of it.

Mr. CHRISTENSEN. I can understand that very well.

Senator WALLOP. I guess the fundamental thing is, in your opinion, who is the beneficiary of the obligation performed by the Office of Surface Mining?

Mr. CHRISTENSEN. I have a very hard time coming to a good clear answer on that. In fact, I'm hoping that the proceedings of this hearing will help me decide that better than I have in my own mind right now.

Senator WALLOP. One last thing. The Governor seemed to think that we might be approaching a time when he could get an answer on the amendments to our cooperative agreement. Is he right in feeling that?

Mr. CHRISTENSEN. He is right. In fact, that's sitting on my desk right now.

Senator WALLOP. I appreciate that, and I know the Governor does, too.

Thank you, Mr. Christensen.

Mr. CHRISTENSEN. Thank you, Senator.

Senator WARNER. Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I have a statement I'd like to enter into the record, if I might.

Senator WARNER. Without objection.

[The prepared statement of Senator Rockefeller follows:]

Statement of Senator John D. Rockefeller IV  
Energy and Natural Resources Committee  
Subcommittee on Natural Resources Development  
and Production  
July 9, 1985

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Mr. Chairman, I want to compliment you for holding this hearing today and for your many efforts on behalf of coal. Furthermore, I want to congratulate you on the distinguished panels of witnesses today; I am confident that a number of the people before us this morning will convince the subcommittee that the proposed Office of Surface Mining regulations would have a detrimental effect on the coal industry.

Mr. Chairman, I consider the current proposal by the Office of Surface Mining to make full cost recovery of permit fees from coal operators on Federal lands, Indian lands and Federal program states as one more step backward in the regulatory arena for coal. Even though this regulation would appear to have minimal direct impact on West Virginia, it also appears to be the first step toward the collection of similar fees in states which administer programs on state and private lands.

Not only is this an example of ill-conceived regulation but it is also ill-timed in placing yet another burden on an industry fighting for survival. Furthermore, I believe this is an example of misplaced management priorities by a regulatory agency that

already has its fair share of administrative and management problems.

Mr. Chairman, it is my conclusion that if the Office of Surface Mining adopts the proposed regulation and later seeks to apply a similar scheme to the state portion of the surface mining program that it would have a significant negative impact on many coal operators of my state, especially small operators. Indeed, in my judgment, it would further weaken the position of our coal companies in both domestic and international markets and make American coal operators more susceptible to the growing threat of substantial coal imports.

Mr. Chairman, obviously I would have many more comments about an extension of the present proposal to state programs. For the moment, suffice it to say that I think the present proposal as applied to Federal lands is a bad precedent and detrimental to those coal operators affected. Again, I compliment the Chairman in holding this hearing and I look forward to hearing from the many distinguished witnesses.



Senator ROCKEFELLER. Thank you very much.

Could you answer this: Are there other environmental statutes that you are aware of in which permit fees and other things that we're discussing here this morning are caused to be paid for by those who do the mining, so to speak?

Mr. CHRISTENSEN. None that I'm aware of, Senator.

Senator ROCKEFELLER. So in a sense, then, is this a kind of precedent setting in terms of environmental procedure?

Mr. CHRISTENSEN. I believe we might be breaking some new ground here, Senator. There are Government agencies that do charge fees for certain services they provide. But I don't think anything that relates to what we're doing here.

Senator ROCKEFELLER. Like environmental impact studies, things of that sort?

Mr. CHRISTENSEN. There are several agencies that do charge for those. The BLM charges for right-of-way, for their EIS's and that kind of thing.

Senator ROCKEFELLER. It was my understanding that the Nuclear Regulatory Commission did some of that, but that for the rest, this would be a new move.

Mr. CHRISTENSEN. I believe we are setting a precedent here, yes.

Senator ROCKEFELLER. Did the idea of this—now, I recognize that you all don't refer to this as phase I and phase II, and that the coal people refer to it as phase I and phase II, and it's phase I that we're discussing—did the idea of this come from you all, or did it come from OMB?

Mr. CHRISTENSEN. The Office of Surface Mining has been looking at this permit fee recovery for over 5 years. To blame it on OMB or other sources would be unfair, I believe, although they're interested in the outcome of it.

Senator ROCKEFELLER. It would save, are we figuring, about \$65 million? Do you have a figure of something of that sort in the total program?

Mr. CHRISTENSEN. Senator, that's a GAO figure. I believe our analysis is somewhat less than that.

Senator ROCKEFELLER. Your analysis would be half of that?

Mr. CHRISTENSEN. I believe that we are looking at more like recovering \$10 to \$15 million.

Senator ROCKEFELLER. In the phase I part?

Mr. CHRISTENSEN. In phase I. Now, that's because we only recover permit costs on what we actually do as a Federal reclamation authority.

Senator ROCKEFELLER. If it's \$10 or \$15 million, it can hardly be considered, let's say, a major thrust toward deficit reduction, and therefore it would be difficult to put over on that basis. Therefore, I would think if you were trying to support it, you would have to feel it's important for the country. It's an important relationship between environmental protection and corporate responsibility and things of that sort.

Now, there are, as I understand it, some 10,400 mines that were in operation in the year 1984. There seems to be the general assumption—and GAO may be more enlightening on this—that if phase I happens, phase II will follow shortly thereafter. And if it goes to 10,400 mines—there may be somewhat fewer of those these



days—then one has to really look at what is the purpose of this. Why are we doing this?

And I don't understand what your rationale would be, other than to say we are shifting the financial burden, some \$10 or \$15 million, from the Government in an area where precedent is almost uniformly—almost uniformly holds that the Government, in protecting health and safety of the people, establishes that it will participate in environmental control and regulation and pay some of the costs thereof. You know, that's an established principle.

Now you're suggesting this principle be unestablished for the purpose of some greater good. What do you see is the purpose of that? If it clearly can't be deficit reduction on any dramatic scale, it's cutting new areas. The coal industry which is, you know, flat on its back, is clearly opposing it. Now, one could say well, they're going to oppose anything that costs another nickel. But it's not as if there were some little widgets here and there who are in support of it. I mean just everybody is strongly against it. They must have a reason for being so. Why is this so important to you folks?

Mr. CHRISTENSEN. Senator, I think your comments are well-taken and I believe you can understand why it's taken us as long as it has to even come forward with this proposal.

Senator ROCKEFELLER. But that doesn't answer my question.

Mr. CHRISTENSEN. That's true.

Senator ROCKEFELLER. What is your feeling as to why it's so important that this be done? I mean here we are, having hearings and people coming from far away—my good friend, Governor Herschler from Wyoming—it takes much longer to get from Wyoming to Washington than it does from West Virginia to Washington, and I've always listened to what he has to say on matters of coal energy.

Why is this so—what's the big deal about this that's so important—unless that it's ordered by OMB, in which case you have little choice?

Mr. CHRISTENSEN. Senator, I think philosophically the administration is concerned that, where possible, fees and costs of Government agencies be recovered where they can. So I think in following the intent of that, and in looking at the law, this was an obvious place where perhaps some fees or costs could be recovered from the industry, and so an attempt was made with this proposal to do just that.

Senator ROCKEFELLER. Is this so in spite of an enormous, sort of manpower regulatory problem in just getting the thing established, were it to be accepted?

Mr. CHRISTENSEN. Senator, it hasn't been that big a problem for us. We've been looking at tracking costs for the last year in our technical centers, and it has not been a big problem.

Senator ROCKEFELLER. Do you know how much it would cost for you to do this? Let's assume for the moment, if you've been studying it for 5 years you must have been looking at whatever you refer to as phase II, and I'm thinking, therefore, with 10,400 mines, that's a lot of paperwork. Have you figured out what this would cost?

Mr. CHRISTENSEN. No, sir.

Senator ROCKEFELLER. Have you figured out the cost of phase I?

Mr. CHRISTENSEN. Phase II is not necessarily our proposal.

Senator ROCKEFELLER. Well, why is it only us innocents up here who figure that if phase I comes into being, that phase II must be closely behind?

Mr. CHRISTENSEN. Well, I think that could certainly follow, but that is not our proposal at this time.

Senator ROCKEFELLER. Primacy is a very interesting concept. And it's a worthy concept. And there are States who have had it withdrawn and States who have withdrawn their own and then have returned to it.

Primacy is a worthy concept, and West Virginia was the first State to get primacy, the very first State to get primacy, and I was Governor at the time and I was very proud of that and continue to be.

Now, primacy implies that the State knows what it's doing, that the State has committed the resources and the personnel power and the commitment to get it done with integrity, balance, and within the law, and that's good. Now, that's also a part of decentralization, Federal Government to State government. That's a worthy objective, isn't it?

Mr. CHRISTENSEN. Yes, it is, Senator.

Senator ROCKEFELLER. Don't you foresee as this comes into being, were it to come into being, either phase I or perhaps phase II following it, that States would decide to give up primacy and return their responsibilities to the Federal Government?

Mr. CHRISTENSEN. That's a very likely possibility.

Senator ROCKEFELLER. Now, what on earth good does that do—if the overall purpose is protecting public health—if OMB has anything to do with this, it will cut out a few million bucks here or there—what's the point of that? Then you're saving over here; then spending it all back over here.

Mr. CHRISTENSEN. Well, that's certainly something we're concerned about because obviously we strongly support primacy and anything to jeopardize that, we're very concerned about, and that's why we're willing to listen and consider all comments made at hearings like this.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Senator WARNER. I'm somewhat perplexed by the fact that we've been informed that OMB has actually put in a prospective budget and anticipated revenues. Is that correct?

Mr. CHRISTENSEN. I understood that that anticipated revenue was for the Interior Department itself, not specifically OSM.

Senator WARNER. I'll submit further questions on that point and ask you to address them after you've had the opportunity to make a more careful analysis of that critical point. I wouldn't want you to deal with it unless you had fact and knowledge that would be of value at this time.

We thank you very much. We recognize the difficulty in undertaking this hearing, having had only several months as the acting head, but you've discharged yourself well.

Mr. CHRISTENSEN. Thank you, Mr. Chairman.

Senator WARNER. No further questions from my colleagues?

We will now hear from Mr. Mike Gryszkowiec, Associate Director, Resources, Community, and Economic Development Division of the GAO.

You have brought along a little backup here, I see.

**STATEMENT OF MICHAEL GRYSZKOWIEC, ASSOCIATE DIRECTOR, RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION, GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY DONNA LUCAS, BERNICE STEINHARDT, NED SMITH, AND RICHARD WADE, GENERAL ACCOUNTING OFFICE**

Mr. GRYSZKOWIEC. With me today are the people who performed the work on the OSM permit study. I'd like to introduce them at this time.

Senator WARNER. Introduce your colleagues, please.

Mr. GRYSZKOWIEC. Thank you, Senator.

Donna Lucas to my left; Bernice Steinhardt; Ned Smith; and Richard Wade. They have done the detail work, and I am sure that we can answer most of the questions that you raise.

Senator WARNER. It was a very wise decision on your part to bring your colleagues forward, and let them see the light of day. A lot of valuable work is done back in GAO. I know your boss very well. We were associated together many years at the Department of the Navy.

Mr. GRYSZKOWIEC. Thank you.

I'd like to present a brief statement and have the total statement submitted for the record.

Senator WARNER. Without objection.

Mr. GRYSZKOWIEC. I appreciate this opportunity to appear here today as you consider the impact on the coal industry of OSM's proposed rules to increase its mining permit fees. As you requested, I will discuss GAO's recent report on how OSM could more fully recover or eliminate its regulatory costs and the effects of doing so on coal demand and production.

To control the environmental damage caused by coal mining, the Surface Mining Control and Reclamation Act of 1977 set standards for coal mining operations and encouraged the States to assume primary responsibility for regulating coal mining on State and private lands. OSM was established to oversee the development of the States' programs and to act as the regulatory authority when States decline to assume authority or do not adequately carry out their responsibilities. OSM also regulates coal mining on Federal and Indian lands, in some cases sharing authority with State governments.

Whether the regulatory authority is OSM or a State, it is required by section 507(a) of the Surface Mining Act to charge a coal mine operator a fee when they apply for a mining permit. The fee, while it may be less, can cover up to the agency's full cost of reviewing, administering, and enforcing the permit. Although the law grants the regulatory agency the discretion to charge less than its full cost, administration and Interior Department policy require Federal agencies to recover as much of their regulatory costs as possible through user fees.

Likewise, we have long held that Federal agencies should recover their costs as fully as possible whenever they provide goods, services or privileges that benefit identifiable recipients.

This position has also been upheld in a series of court decisions that have found that costs may be recovered from regulated industries when the services provided are necessary to a company's operation. We continue to believe that assessing costs against beneficiaries, rather than taxpayers in general, promotes more fair, efficient, and economical Government operations.

During our review we found that OSM spent about \$65 million in fiscal year 1984 to regulate coal mining operations. It spent about \$9 million administering its own regulatory program and \$42 million to provide States with grants for mining regulation. We believe that OSM should exercise its existing authority to recover or eliminate these costs. OSM also spent about \$14 million on research, oversight, and other activities in support of both Federal and State regulation. These support costs could also be offset if the Congress wishes to enact a special tax.

We believe that OSM should assess all operators it regulates directly the actual costs it incurs to review, administer, and enforce the permits. OSM currently collects permit fees only from operators on Federal lands that are regulated solely by OSM. Moreover, these fees are generally well below OSM's costs.

As a consequence, in contrast to the \$9 million it spent on permit related activities in 1984, OSM collected about \$29,000 in permit fees.

We support OSM's actions to increase its permit fees and extend them to all mine operators regulated by it. However, while these fees as proposed by OSM would be based on the actual cost of processing permits, it would not include OSM's costs for routine inspections of mine operations or other enforcement activities.

OSM's 1984 inspection enforcement costs came to about \$4 million out of the \$9 million in OSM's regulatory program costs.

OSM is concerned that recovering the cost of inspection and enforcement will impose an additional economic burden on mine operators. While recovery of these costs would add to operators' costs, coal industry officials told us that small coal operators are likely to be the ones most affected by any increase in fees. We know, however, that the Surface Mining Act singles out small operators for special treatment and protection from onerous regulatory requirements.

OSM proposes in its draft regulations to assist small operators by charging them a nominal fee of \$500. By assisting them in this way, OSM could lessen the economic burden on small operators, while still recovering the cost of enforcement activities from others.

Of the \$65 million in OSM regulatory costs, \$42 million was for its grant programs. About \$5 million of the \$42 million was for States with cooperative agreements. The rest, \$37 million, was for administration and enforcement grants that help support State regulatory programs.

The Surface Mining Act does not require that OSM provide grants to the States. It simply authorizes the Secretary of the Interior to do so. States can raise their permit fees to recover the costs of coal mining regulation that are now supported by Federal



grants. If the grant program were phased out, the States would have incentive to exercise this authority.

We therefore believe that OSM should begin phasing out both its administrative and enforcement grants, as well as its cooperative agreement grants, giving the States enough time to accommodate the loss of funding.

We recognize this may not always be feasible. During the course of our review, a few State regulatory officials told us that many of the mine operators in their States are small and that for them an increase in permit fees would pose a substantial economic hardship, forcing them out of business. In Kentucky, for example, about 70 percent of the operators fall into this category.

As I've noted earlier, the Surface Mining Act shows the intent on the part of Congress to provide small operators special treatment. It is for this reason that OSM is proposing lower permit fees for them.

While OSM has the authority to recover or eliminate most of its regulatory costs, it cannot now recover the cost of activities that support both Federal and State regulatory programs. These include such things as mining-related research and technical assistance. Court decisions of recent years have established that Federal agencies may not recover such costs through fees, holding that agencies may charge fees only for activities that benefit an identifiable recipient. Since OSM's support activities do not benefit any single permit holder, OSM could recover its costs for these activities only if Congress was to levy a special tax on coal mine operators for that purpose.

As you know, the Surface Mining Act does not authorize such a tax, but because these support activities primarily benefit coal mine operators as a group rather than the general public, we believe Congress may wish to consider whether to enact a special tax, thereby offsetting costs of about \$14 million a year for support activities.

Of course, the basis for these savings is the transfer of costs from the Government to coal operators and ultimately consumers. Consequently, as part of our review, we examined the impact of recovering the regulatory costs on coal demand and production both at the national and State or regional levels.

In some ways our analysis could be considered a worst case scenario since it assumes that OSM would recover all of its permitting and enforcement costs as well as the costs of its support activities. It also assumes that each State would recover all of its permit and enforcement costs from coal operators, even though a number of States now use other revenues to support their programs and might continue to do so in the future.

In all, the State and Federal regulatory costs amounted to about \$94 million in 1984. Thus, assuming full cost recovery, about \$94 million would be added to the annual cost of coal production in the United States. On the basis of the level of coal production in 1982, this would add about 11.7 cents per ton on a nationwide average. State-by-State, the increase in production costs would vary considerably, depending on the costs of permitting and enforcement and the amount of coal mined.



We found that costs would increase by as little as 3.8 cents in Arizona to as much as 38.8 cents in Tennessee.

Our analysis found that if production cost increases were reflected in coal prices, there would be no significant effect on demand. According to Energy Information Administration data, coal enjoys a considerable price advantage over other fuels used for electricity generation, which accounts for 80 percent of the demand for U.S. coal. Because of this price advantage, the EIA staff told us that coal prices might have to rise by \$5 a ton before any significant change in coal demand might occur.

EIA data also suggest that export of U.S. coal would be unaffected because the price increase would be such a small proportion of the delivered price of coal, hardly more than a half a percent in some cases.

Although we found that overall demand for coal was not likely to be affected by full cost recovery, there remained the possibility that variations in regulatory costs from State to State would cause regional shifts in demand, with coal production moving from States with higher regulatory cost per ton of coal to lower cost States. Here again, we found little change resulting from production cost increases.

With the help of EIA staff, we used their Coal Supply and Transportation Model which simulates the choices of supply sources and transportation modes that coal customers within various regions of the country will make, depending on variations in coal costs. The model assumes that operators would pass along their costs in the delivered price of coal. In this way, we found that by 1990 only Pennsylvania, where we estimated regulatory costs to be about 20 cents a ton, could lose about a million and a half tons of coal production a year to West Virginia, where their regulatory costs would be close to 9 cents a ton. No other significant changes in production and distribution were projected, including any major inter-regional shifts, such as from East to West.

In its own later analysis, the Interior Department reached much the same conclusions. Using a U.S. Geological Survey model which examined coal production in 100 coal mining regions, rather than by State, Interior found that the recovery of regulatory costs as calculated by OSM would have no effect on coal production. Interior then ran its model using our estimates of costs, which were somewhat higher than OSM's. This run shows that in the Midwest, one region was expected to lose 1 million tons to another, while in the West three regions were projected to lose a combined total of roughly 800,000 tons to another region by 1990.

As is our usual procedure, we asked for comments on our draft report. We asked for comments from Interior, the Governors of 27 coal mining States, coal industry associations, and citizen and environmental groups. In addition to Interior, 19 of the 27 States replied, as did half of the other groups. All of the States who commented, along with the coal groups, objected strongly to our recommendations, particularly to the elimination of State grants. Six States told us that they might relinquish mining regulation to the Federal Government because they could not, or would not, replace grant funds with other revenues or fees assessed against coal operators.

Many of those who raised objections were against cost recovery in principle, arguing that since the public benefits from surface mining regulations, coal operators should not have to assume the costs. A number of the States were also opposed to our proposals because they feared the adverse effects of increased costs on coal operators, especially small ones.

As we noted in responding to these comments in our report, we recognize that full cost recovery could lead some States to give up their regulatory programs. We also recognize that some coal companies, especially small ones, might find any production cost increase, no matter how small, a significant burden. However, surface mining regulations will continue if State programs end and if OSM wishes to, it may continue to provide support to cover the cost of small operators who cannot afford to pay their full share.

We do not disagree with those who argue that the Surface Mining Act's intent is to protect the public. Indeed, all Federal regulation is meant to serve the public interest. The question is whether the public at large or coal mine operators and their customers should bear the cost. We believe that there is sufficient policy and legal precedent to justify the full recovery of OSM's regulatory costs.

Mr. Chairman, this concludes my statement. I'd be pleased to respond to any questions.

[The prepared statement of Mr. Gryszkowiec follows:]

UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

FOR RELEASE ON DELIVERY  
TUESDAY JULY 9, 1985  
EXPECTED AT 9:30 A.M.

STATEMENT OF  
MICHAEL GRYSZKOWIEC, ASSOCIATE DIRECTOR  
RESOURCES, COMMUNITY, AND ECONOMIC DEVELOPMENT DIVISION  
U.S. GENERAL ACCOUNTING OFFICE  
BEFORE THE  
SUBCOMMITTEE ON NATURAL RESOURCES DEVELOPMENT AND PRODUCTION  
COMMITTEE ON ENERGY AND NATURAL RESOURCES  
UNITED STATES SENATE  
ON  
GAO'S REPORT  
THE DEPARTMENT OF THE INTERIOR'S OFFICE OF SURFACE MINING  
SHOULD MORE FULLY RECOVER OR ELIMINATE  
ITS COSTS OF REGULATING COAL MINING

Mr. Chairman and Members of the Subcommittee:

I appreciate this opportunity to appear here today as you consider the impact on the coal industry of the Office of Surface Mining's (OSM's) proposed rules to increase its mining permit fees. As you requested, I will discuss GAO's recent report on how OSM could more fully recover or eliminate its regulatory costs and the effects of doing so on coal demand and production.<sup>1</sup>

Our report recommends that OSM use its existing legal authority to recover or eliminate more than \$51 million a year in regulatory costs. Specifically, we recommend that OSM assess coal operators permit fees to fully recover its own regulatory costs and phase out or substantially reduce its grants to states. These are grants that assist states--or in some cases reimburse them--for the costs of regulating surface mining. We also believe that

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<sup>1</sup>The Department of the Interior's Office of Surface Mining Should More Fully Recover or Eliminate Its Costs of Regulating Coal Mining (GAO/RCED-85-33, May 28, 1985).

the Congress may wish to consider enacting a special tax on coal operators to offset regulatory support costs of another \$14 million. Our analysis indicates that recovery of all these costs would have little effect on coal demand and production.

In my testimony today I will describe the findings and conclusions that led to these recommendations, focusing on:

- the basis for full cost recovery,
- OSM's regulatory programs and their costs,
- the impact of recovering the costs of state and federal regulation on coal demand and production, and
- state and interest group comments on our report.

#### BACKGROUND

To control the environmental damage caused by coal mining, the Surface Mining Control and Reclamation Act of 1977 sets standards for coal mining operations and encourages the states to assume primary responsibility for regulating coal mining on state and private lands. The Office of Surface Mining was established within the Department of the Interior to oversee the development of the states' programs and to act as the regulatory authority when states decline to assume authority or do not adequately carry out their responsibilities. OSM also regulates coal mining on federal and Indian lands, in some cases sharing authority with state governments.

Under the Surface Mining Act, OSM is authorized to award grants to states to assist them in the development, administration, and enforcement of their regulatory programs. States can also receive grants to regulate mining on federal lands if they have approved programs and cooperative agreements with Interior.

Whether the regulatory authority is OSM or a state, it is required by section 507(a) of the Surface Mining Act to charge coal mine operators a fee when they apply for a mining permit. The fee--while it may be less--can cover up to the agency's full costs of reviewing, administering, and enforcing the permit.

#### COST RECOVERY GOALS

Although the law grants the regulatory agency the discretion to charge less than its full costs, administration and Interior Department policy require federal agencies to recover as much of their regulatory costs as possible through user fees. Likewise, we have long held ~~that~~ federal agencies should recover their costs as fully as possible whenever they provide goods, services, or privileges that benefit identifiable recipients.

This position has also been upheld in a series of court decisions that have found that costs may be recovered from regulated industries when the services provided are necessary to a company's operation.<sup>2</sup> We continue to believe that assessing costs against beneficiaries, rather than taxpayers in general, promotes more fair, efficient, and economical government operations.

Consequently, in reviewing OSM activities, our objectives were to estimate the agency's costs to regulate coal mining and to assess how it could more fully recover its costs through permit fees and other means available under the Surface Mining Act.

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<sup>2</sup>See, for example, Mississippi Power and Light Co. v. Nuclear Regulatory Commission, 601 F. 2d 223 (5th Cir., 1979).



OSM REGULATORY COSTS

We found that OSM spent about \$65 million in fiscal year 1984 to regulate coal-mining operations. It spent about \$9 million administering its own regulatory programs and \$42 million to provide states with grants for mining regulation. We believe that OSM should exercise its existing authority to recover or eliminate these costs. OSM also spent about \$14 million on research, oversight and other activities in support of both federal and state regulation. These support costs could also be offset if the Congress wished to enact a special tax.

OSM should seek full recovery  
of its own regulatory costs

We believe that as the first of its cost recovery measures, OSM should assess all operators that it regulates directly the actual costs it incurs to review, administer, and enforce their permits. OSM currently collects permit fees only from operators on federal lands that are regulated solely by OSM. Moreover, these fees are generally well below OSM's costs. As a consequence, in contrast to the \$9 million it spent on permit-related activities in 1984, OSM collected only \$29,000 in permit fees.

We therefore support OSM's actions to increase its permit fees and extend them to all mine operators regulated by it. However, while these fees--as proposed by OSM--would be based on the actual costs of processing permits, they would not include OSM's costs for routine inspections of mine operations or other enforcement activities, even though the Surface Mining Act

specifically allows such costs to be included. OSM's 1984 inspection and enforcement costs came to about \$4 million out of the \$9 million in OSM regulatory program costs.

OSM is concerned that recovering the costs of inspection and enforcement will impose an additional economic burden on mine operators. While recovery of these costs would add to operators' costs, coal industry officials told us that small coal operators are likely to be the ones most affected by any increase in fees. We note, however, that the Surface Mining Act singles out small operators for special treatment and protection from onerous regulatory requirements.<sup>3</sup> OSM proposes in its draft regulations to assist small operators by charging them a nominal fee of \$500. By assisting them in this way, OSM could lessen the economic burden on small operators while still recovering the costs of enforcement activities from others.

OSM should phase out or substantially reduce grants to states

Of the \$65 million in OSM regulatory costs, \$42 million was for its grant programs. About \$5 million of the \$42 million was for states with cooperative agreements to regulate mining on federal lands. The rest--\$37 million--was for administration and enforcement grants that help support state regulatory programs.

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<sup>3</sup>Under Section 507(c) of the act, small operators--defined by the law as producing less than 100,000 tons a year--can get assistance from OSM or state regulatory authorities in meeting certain permit requirements.

Although the states could fully recover their regulatory costs from operators under the same authority that OSM now proposes to exercise, the grants that they receive from OSM give them no reason to do so. Each of these states with approved programs now charges a permit fee, as required by law. In most cases, however, the fees are under \$500, ranging from \$5 to \$2,500 plus \$25 per acre. While we did not determine the states permit costs, we estimate that it costs OSM from \$72,000 to \$235,000 to process and enforce a mining permit, depending on the size and location of the mine and other factors. Even if the states' costs are much lower than OSM's, their fees will not approach program costs.

The Surface Mining Act does not require that OSM provide grants to the states; it simply authorizes the Secretary of the Interior to do so. As mentioned earlier, we have historically taken the position that when federal funds are used indirectly to subsidize identifiable beneficiaries, as in the case of grants to state and local governments, federal agencies should encourage the recovery of their expenditures by requiring reimbursement or eliminating grants altogether.

States can raise their permit fees to recover the costs of coal mining regulation that are now supported by federal grants. If the grant programs were phased out, the states would have incentive to exercise this authority. We therefore believe that OSM should begin phasing out both its administration and enforcement grants as well as its cooperative agreement grants, giving the states enough time to accommodate the loss of funding.

We recognize that this may not be always feasible. During the course of our review, a few state regulatory officials told us that many of the mine operators in their states are small and that for them, a large increase in permit fees could pose a substantial economic hardship, forcing them out of business. In Kentucky, for example, about 70 percent of the operators fall into this category.

As I noted earlier, the Surface Mining Act shows the intent on the part of the Congress to provide small operators special treatment; it is for this reason that OSM is proposing lower permit fees for them. If OSM wanted to extend this policy to support small operators, it could continue to provide grant support to the states.

But even with continued assistance to the states for small operators, OSM could still realize substantial savings by reducing or phasing out its grant programs. In the four states where 82 percent of the country's small operators are concentrated, OSM could cut back its grant programs by close to half if support were limited to small operators, and save about \$10 million in those four states alone.

Together, these two measures--charging full cost permit fees and eliminating state grants--could save the federal government up to \$51 million a year depending on the continued level of support provided to small operators. While our recommendations go considerably beyond OSM's current proposal, we believe, for the reasons I've discussed, that they merit serious consideration.

Recovery of support costs  
would require legislation

While OSM has the authority to recover or eliminate most of its regulatory costs, it cannot now recover the cost of activities that support both federal and state regulatory programs. These include mining-related research, technical assistance, development of regulations, and mine inspections and reviews of state-issued permits to check for compliance with federal law. Court decisions of recent years have established that federal agencies may not recover such costs through fees, holding that agencies may charge fees only for activities that benefit an identifiable recipient. Since OSM's support activities do not benefit any single permit-holder, OSM could recover its costs for these activities only if Congress were to levy a special tax on coal mine operators for that purpose.

As you know, the Surface Mining Act does not authorize such a tax. But because these support activities primarily benefit coal mine operators as a group, rather than the general public, we believe Congress may wish to consider enacting a special tax, thereby offsetting costs of about \$14 million a year for support activities. Since OSM now collects a tax from operators to pay for reclaiming abandoned mine lands, it already has the administrative capability to collect additional taxes.<sup>4</sup>

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<sup>4</sup>Under the Surface Mining Act, coal operators are assessed a tax of 35 cents per ton of coal produced by surface mining, 15 cents per ton for underground mining, and 10 cents per ton for lignite (or 10 percent of the coal's value at the mine and 2 percent of the lignite's value at the mine, whichever is lower.)



To sum up, if OSM were to charge fees that fully reflected its costs to process and enforce its permits, and if it were to eliminate its grants to states, it could save over \$51 million a year. If, in addition, Congress were to authorize a special tax to offset the costs of OSM's support activities, the total savings realized would be about \$65 million annually.

#### EFFECTS OF COST RECOVERY

The basis for these savings, of course, is the transfer of costs from the government to coal operators and, ultimately, consumers. Consequently, as part of our review, we examined the impact of recovering regulatory costs on coal demand and production, both at the national and state or regional levels. In some ways, our analysis could be considered a worst-case scenario, since it assumes that OSM would recover all of its permitting and enforcement costs, as well as the costs of its support activities. It also assumes that each state would recover all of its permit and enforcement costs from coal operators, even though a number of states now use other revenues to support their programs and might continue to do so in the future. In all, these state and federal regulatory costs amounted to about \$94 million a year in 1984.

Thus, assuming full cost recovery, about \$94 million would be added to the annual costs of coal production in the United States. On the basis of the level of coal production in 1982, this would add 11.7 cents per ton on a nationwide average. State by state, the increase in production costs would vary considerably, depending on the costs of permitting and enforcement and the amount of coal mined. We found that costs could increase by as

little as 3.8 cents a ton in Arizona to as much as 38.8 cents a ton in Tennessee.

Our analysis found that if production cost increases were fully reflected in coal prices, there would be no significant effect on demand. According to Energy Information Administration (EIA) data, coal enjoys a considerable price advantage over other fuels used for electricity generation, which accounts for 80 percent of the demand for U.S. coal. Because of this price advantage, the EIA staff told us that coal prices might have to rise by \$5 a ton before any change in coal demand might occur. Moreover, the highest production cost increase of 38.8 cents a ton was less than 1 percent of the delivered price of coal per ton to consumers in 1984. EIA staff also said that a 3 to 40 cents-a-ton price increase would have only a negligible effect on electricity costs to consumers.

EIA data also suggests that exports of U.S. coal would be unaffected because the price increases would be such a small portion of the delivered price of coal--hardly more than half a percent per ton in some cases. In addition, U.S. coal historically has been \$10 to \$20 a ton more expensive than coal from other countries, indicating that other factors--such as security of supply--are more significant than price competitiveness in determining demand for U.S. coal.

Although we found that overall demand for coal was not likely to be affected by full cost recovery, there remained the possibility that the variations in regulatory costs from state to state could cause regional shifts in demand, with coal production moving

from states with higher regulatory costs per ton of coal to lower-cost states. Here again, however, we found little change resulting from production cost increases.

With the help of EIA staff, we used their Coal Supply and Transportation Model, which simulates the choices in supply sources and transportation modes that coal customers within various regions of the country will make, depending on variations in coal costs. The model assumes that operators would pass along their costs in the delivered price of coal. In this way we found that by 1990, only Pennsylvania--where we estimate regulatory costs to be about 17 cents a ton (or 20 cents a ton with support costs added)--could lose about 1.5 million tons of coal production a year to West Virginia, where regulatory costs are close to 6 cents a ton (9 cents with support costs). No other significant changes in production and distribution were projected, including any major interregional shifts, such as from East to West. For Pennsylvania, this loss represents about 1 percent of the state's production, and a shift of about a tenth of a percent of the nation's production.

In its own, later analysis, the Interior Department reached much the same conclusions. Using a U.S. Geological Survey model, which examines U.S. coal production in 100 coal-mining regions rather than by state, Interior found that the recovery of regulatory costs, as calculated by OSM, would have no effect on coal production. The cost increase, Interior found, was not large enough to change the relative cost advantage of even a few coal-supply regions. Interior then ran its model using our estimates

of costs, which were somewhat higher than OSM's. This run showed that in the Midwest, one region was expected to lose about 1 million tons to another, while in the West, three regions were projected to lose a combined total of roughly 800,000 tons to another region by 1990.

Although we assumed that regulatory costs would be fully passed on to consumers in the form of higher prices, we recognized that coal companies might not always choose to or be able to increase their prices. We therefore talked to a number of coal industry officials to find out generally how production cost increases of the magnitude that we projected might affect the industry. Although no one welcomed additional costs, they said that the increase would be a burden primarily to small operators, who often cannot pass through cost increases to their customers. However, as I noted earlier, this could be mitigated by some continued level of support for small operators.

#### STATE AND INTEREST GROUP COMMENTS

Despite our finding of a general absence of impact resulting from cost recovery, we nevertheless recognize that the effects of our recommendations could be far-reaching. As is our usual procedure, we asked for comments on our draft report from the Interior Department. We also invited comments on the report from the governors of 27 coal mining states, coal industry associations, and citizen and environmental groups. In addition to Interior, 19 of the 27 states replied, as did about half of the other groups.

All of the states who commented, along with the coal groups, objected strongly to our recommendations, in particular to the elimination of state grants. Six states told us that they might relinquish mining regulation to the federal government because they could not or would not replace grant funds with other revenues or fees assessed against coal operators.

Many of those who raised objections were against cost recovery in principle, arguing that since the public benefits from surface mining regulation, coal operators should not have to assume the costs. A number of states were also opposed to our proposals because they feared the adverse effects of increased costs on coal operators, especially small operators.

As we noted in responding to these comments in our report, we recognize that full cost recovery could lead some states to give up their regulatory programs. We also recognize that some coal companies, especially small ones, might find any production cost increase, no matter how small, a significant burden. However, surface mining regulation will still continue under federal auspices if state programs end. And if OSM wishes to, it may continue to provide support to cover the costs of small operators who cannot afford to pay their full share.

We do not disagree with those who argue that the Surface Mining Act's intent is to protect the public. Indeed, all federal regulation is meant to serve the public interest. The question is whether the public at large or coal mine operators and their customers should bear the costs. We believe that there is sufficient policy and legal precedent to justify the full recovery of OSM's regulatory costs.

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Mr. Chairman, this concludes my remarks. I would be pleased to respond to any questions.



Senator WARNER. I understand, and I'm reading the rule here now the calculations for billing fee—if I may return to that momentarily, that seems to me to be the set of criteria with which you would adjudicate the actual cost.

What concerns me is what procedures were followed by the Secretary in making determination under the statute, given rather a broad latitude of discretion. I read it out before: "Such fees shall be less than, but not to exceed the actual anticipated cost."

What considerations did he follow in arriving at the policy determination that the Department will endeavor to recover actual—I think "actual" coincides with your use of the words—I copied them down—"will try and collect as much as possible."

Mr. GRYSZKOWIEC. The surface mining law allows it.

Senator WARNER. I understand that. We wrote the law and Congress is responsible for that. We may have to make some adjustment to that in view of what we're learning today. But I'm coming back to—did you determine a procedure by which the Secretary made the policy determination to seek the uppermost cost, which is actual?

Mr. GRYSZKOWIEC. It is administration and Interior policy to try to recover as much of the regulatory cost as possible from identifiable beneficiaries.

Senator WARNER. That's the policy. Is that policy applied uniformly? For example, we are of the impression that the coal industry at the present time—hopefully not for long—but at the present time is faced with an array of factors which make the business very precarious.

Was that taken into consideration in determining that you would seek as much as possible—namely, the actual?

Mr. GRYSZKOWIEC. I'm not aware of all the factors the Secretary considered in arriving at their current permit fee proposal.

Senator WARNER. So you didn't go into the means by which the Secretary arrived at the policy decision to do the actual level?

Mr. GRYSZKOWIEC. No, we didn't. We examined the law and what the law allowed the Secretary to recover, and that was the basis of our report.

Senator WARNER. And then how you would implement that by the rules?

Mr. GRYSZKOWIEC. We looked at how the costs could be recovered, whether the costs could be legally recovered, and what impact, based on our own analysis and available studies, that full cost recovery would have on coal production and demand.

Senator WARNER. Senator Rockefeller posed an interesting question. Is there a precedent in the environmental area with the Federal Government levying such costs?

Mr. GRYSZKOWIEC. We feel the Nuclear Regulatory Commission probably comes the closest to a parallel in this regard, in that they do charge for costs associated with licensing, inspections, EIS's. We feel there is precedent in this area for recovering costs.

Senator WARNER. I think the answer is clear, but I want to put it in the record. If you had, say, a seam running in Appalachia and a company—a large company according to your definition—were to seek an application, say, at one point in that seam and then maybe 5 miles down the seam, basic to the same circumstances, another

large company—but which was experiencing very difficult economic times—in other words, one healthy company, one not so healthy, but both in the large category seeking to get an application to go into that seam, presumably both would be charged the same costs.

Mr. GRYSZKOWIEC. Yes, they would, if their permit-related costs were the same.

Senator WARNER. Thank you.

Senator FORD.

Senator FORD. Have you ever been close to the coal business? Have you been inside the operation to look at what people do as it relates to production and sales and transportation?

Mr. GRYSZKOWIEC. Not personally. No, sir.

Senator WARNER. Mr. Ford, would you yield for a moment?

You have your colleagues here. I'm not sure just what your communication system is for them to amplify your responses. But we'll leave that to you. I mean the Chair doesn't propose to read the eyes of the panel, eyes of your colleagues. If they wish to be recognized, they can speak to you if they wish to contribute, and we would enjoy having any contributions they wish to make.

Thank you.

Senator FORD. So you really don't really understand the coal business, do you?

Mr. GRYSZKOWIEC. I have not worked in the coal business. No, sir.

Senator FORD. What you've done is just gotten a group of people in a think tank and tried to figure out a way to stick it to the coal operators, to take a policy of the administration to return all regulatory costs to the Federal Government.

Mr. GRYSZKOWIEC. We examined regulatory cost recovery from a position that GAO has long held, that Federal agencies should try to recover as much of their costs as possible.

Senator FORD. So really, you have no feel for what you are doing. You just were in a room, hopefully smoke-filled, and made a decision. That's typical, you know, and I'm not trying to be too harsh.

But are you aware of the extraction of coal in western Canada, shipped by rail to the coast and put on a ship down the west coast, through the Panama Canal, up the east coast, and delivered at Boston—cheaper—less expensive, let's put it that way—than that extracted and shipped from Appalachia?

Mr. GRYSZKOWIEC. I'm not specifically aware of it. I'm sure it could occur.

Senator FORD. OK. So that's point No. 2.

One, you don't know anything about the coal business; and two, you're not aware of the transportation costs and extraction costs as it relates to import of coal into this country.

Now, are you aware of any bidding process as it relates to coal contracts—the major users?

Mr. GRYSZKOWIEC. No, I'm personally not aware of the bidding process.

Senator FORD. You talk about 11 percent, or 11-cents-per-ton increase as an average. Tennessee, which has very little, I think it was 3.8 cents. I believe Wyoming was 38 percent. Is that right?

Mr. GRYSZKOWIEC. No.

Senator FORD. What was the 38 cents?

Mr. GRYSZKOWIEC. Tennessee.

Senator FORD. Was that Tennessee? I thought that was 3.8. I was reading your statement here.

Oh, it's 3.8 a ton in Arizona and 38.8 cents in Tennessee.

Are you aware that that amount of increase in cost per ton would actually eliminate those producers from bidding?

Mr. GRYSZKOWIEC. No, we didn't look at that in—

Senator FORD. See, that's No. 4. That's No. 4. You didn't look at the problems. You didn't look at the cost of transportation. You didn't look at the ability—so many cents per ton, even the 4 cents, 3.8 cents, would eliminate the producer from his ability to bid.

Mr. GRYSZKOWIEC. But, Senator, we did talk to people in the industry. We talked to people in the States. We talked to people who were extremely knowledgeable of those activities, while I personally—

Senator FORD. Did a one of those agree with what you were trying to do? Did any of them say, sure, we can absorb that?

Mr. GRYSZKOWIEC. Yes.

Senator FORD. How many? Who were they? That's what I want to know. Who were they?

Mr. GRYSZKOWIEC. They were some of the larger—

Senator FORD. Larger. Yeah. OK.

Now, let's get to the larger versus the small. How many of the small operators do you think will be put out of business as it relates to this? Even the report shows how much is going to be shifted from one area to the other.

Mr. GRYSZKOWIEC. In the report we highlight that small operators could continue to receive special treatment and that the law allows for that.

Senator FORD. Are you aware of the fact that since 1978, I believe, that 60 percent of the small operators have already closed down?

Mr. GRYSZKOWIEC. Yes, I am aware that a large number of small operators have closed.

Senator FORD. And don't you think this would be a significant burden in addition to that for them to bear?

Mr. GRYSZKOWIEC. We feel that by limiting the amount of permit costs to small operators, the impact should not be very great.

Senator FORD. Well, it looks like Kentucky would lose about 840,000 tons, if my figures are right, with your cost recovery. That's nine more small operators going out of business.

And our distinguished chairman said a few moments ago, that in Colombia we've already sent about \$700 million to them in order for them to buy equipment, do the things to extract the coal, to bring it into this country against our people. And then you want to throw another burden on top of the consumer.

Something—something in this proposal ain't right, if I can use that term. And we stand to lose more, my State does, under this—and I see the heads shaking. So if my State stands to lose more, I just want to say to you, there's going to be blood on the carpet before you get this one through. It may be mine, but I just want to tell you and alert you now that you're not going to do this to my consumers—I mean my constituency—if I can prevent it, because the four questions that I asked you originally indicated—and we

have it on the record—that you don't understand the business at all.

You have no idea of the small infinitesimal amount of money that would allow our operators to win a bid as it relates to the sale of coal. And you want to add 12 cents a ton, average. And it just doesn't work, Mr. Director.

I have always been known as one who tells it up front. So I want you to know up front on this one. And as I understand it, the law has to be changed in order to do what you want done. Is that correct?

Mr. GRYSZKOWIEC. Only the part on recovering support costs.

Senator FORD. Only the part on that. Well, we'll see about that, too.

Senator FORD [presiding]. Mr. Chairman is gone.

Senator Rockefeller, would you like——

Senator ROCKEFELLER. No questions.

Senator FORD. There are no further questions. You and your crew are thanked for being here this morning.

Senator WARNER [presiding]. We'll now entertain a panel discussion and invite Mr. Faerber, administrative assistant to Governor Arch Moore, and Ms. Charlotte Baldwin, secretary, Department of Natural Resources, State of Kentucky.

We'll ask Senator Ford to introduce Ms. Baldwin.

Senator FORD. Mr. Chairman, I'm very pleased that Secretary Charlotte Baldwin is here today to testify. She comes with a very distinguished background, having administrative ability before she arrived at Frankfort to take her present position.

She has lived and operated within the coalfields of western Kentucky, understands this problem very, very well. She is giving a good account of Kentucky and of herself, and I'm very pleased that she's here today. She, in her statement, covers several points which I think are important, those that we consider phase I and those in phase II. And, Mr. Chairman, I thank you for allowing me to present this distinguished woman to this committee.

Senator WARNER. I thank the Senator from Kentucky. And if the question were posed, do you understand the coal business, I expect we could get a positive response?

Senator FORD. The answer is yes.

Senator WARNER. Would you like to introduce the witness——

Senator ROCKEFELLER. I think the same would be true from the gentleman from West Virginia. He would give us helpful and positive responses also.

Senator WARNER. I thank my colleagues. And we'll now have the secretary. Secretary Baldwin, will you lead off? And we have your testimony which will be admitted to the record in complete form, and we would suggest that, if possible, you could summarize it.

#### STATEMENT OF CHARLOTTE E. BALDWIN, SECRETARY, NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET, COMMONWEALTH OF KENTUCKY

Ms. BALDWIN. Thank you, Mr. Chairman and distinguished committee members. I am Charlotte Baldwin. I've been introduced and, Senator Ford, I appreciate that formal introduction. I am here to



voice my concern about the importance of grant sharing to States with primacy under the Federal Surface Mining Act of 1977.

And I think it's important to say that I represent the concerns not only of Kentucky, but all the member States of the Interstate Mining Compact Commission of which Kentucky is the largest coal-producing State.

We're here to respond to the report by the General Accounting Office to the chairman of the Senate Committee on Energy and Natural Resources. This report calls on the Federal Office of Surface Mining to begin eliminating grant sharing for States that have assumed primacy under the Federal Surface Mining Control and Reclamation Act of 1977.

There are several ways that I wish to respond to this recommendation, and the first is to challenge that the principle of grant sharing was a key provision in the legislative history of the Surface Mining Act.

The act clearly provides for a joint partnership between the Federal and the State governments to accomplish the coal regulatory program envisioned by Congress. Grant sharing by OSM to the primacy States is mandated in section 705(a) of the act. Kentucky and all other primacy States accepted the terms of the Surface Mining Act based upon the understanding that 50 percent of the funds necessary to administer the program would come from Washington.

An agreement was made; both the Federal and State agencies have upheld that agreement since 1977. And now the GAO recommends to undercut that agreement, an agreement that works most effectively.

An end to the 50-50 share for primacy would have wide-ranging impact on Kentucky and all other coal producing States. This is a costly program which the States cannot fund themselves. The primacy program funding is not unlike other programs, conceived by Congress, and made available for State participation. Grant sharing is a longstanding administrative method between State and Federal agencies. Kentucky is representative of other States which jointly provide environmental regulation through grant sharing agreements with Federal agencies.

Kentucky's Department for Environmental Protection, housed in my cabinet, along with the department for surface mining, have several grant sharing primacy programs in place. Two years ago we accepted the National Pollution Discharge Emissions System under the Clean Water Act. Currently, we are negotiating for the Federal Resource Conservation and Recovery Act which will impact Kentucky's growing problem with hazardous waste.

The surface mining primacy program is perhaps the cabinet's largest and most comprehensive regulatory package shared with a Federal agency. You can see, then, that grant sharing for primacy is not unusual among regulatory programs. Nevertheless, what is unusual is that GAO would propose to end grant sharing as a way for States and the Nation to jointly remedy plaguing problems.

I have tried to understand what would provoke the GAO to make such a recommendation. One clue to their rationale is contained in the report, which brings me to my second challenge to the wisdom of the recommendations.



The GAO contends that they have "long held that Federal agencies should recover their cost as fully as possible whenever the goods, services, or privileges benefit identifiable recipients." The report continues by citing the coal industry as the beneficiary of the State primacy programs.

Has it been so long since the Surface Mining Act was debated that the overriding premise of the legislation has been forgotten? Was it not for the benefit of the environment that the Surface Mining Act was passed? And who, then, benefits from better control of the environment during the process of mineral extraction—is it not the citizens of the several States who are the beneficiaries?

From my long years of experience in the coal regions of Kentucky, I state without qualification that it is the general public who benefits from the coal primacy program. It is the public that enjoys the protection of their environment.

Why, then, does the GAO report propose that the coal industry is the beneficiary of the primacy program? Ask any coal producer about the primacy program and they will tell you not about the benefits of reclamation, but about the sacrifice that they have made to mine coal in an environmentally sound manner. The Surface Mining Act means to the coal operators more oversight, more planning, more time delays, more expense, less profit, and less ability to compete to in the world market. And yet, the GAO report suggests that since the coal industry so benefits from the Surface Mining Act, then the coal industry should pay for the Federal share of the program. I contend it is the public who realizes the greatest benefit from the Surface Mining Act, and that it is the Federal Government's obligation to remain involved in grant sharing and to bring those benefits about for the general public.

Even if this interpretation of the act and its framework for sharing the cost of regulation is considered by some to be incorrect, then what are the consequences of withdrawing the Federal share of the States' primacy programs?

For the regulation of the coal industry, it would mean unbelievable upheaval. The GAO report contends that the transfer of the regulatory costs from the Federal agency to the coal industry will not create production problems. This assumption is unfounded. Coal is a marketable commodity that functions in a true supply and demand market. Producers of coal must bear all costs associated with production. Coal producers hope that when they have a marketable product, the market will bring revenues that exceed the cost of production. There are not guarantees for profit, particularly in today's coal market. Added costs of any kind to Kentucky's coal operators will cause many struggling or borderline operations to cease and will cause many profitable operations to falter.

Kentucky's coal industry is made up of 70 percent small operators. The heavy burden created by the GAO recommendation would send many of these small operators and hundreds of miners out of business.

I ask you respectively, is this the philosophy of the Surface Mining Act? Indeed it is not, and that is why the Federal grant share must stay in place.

And what of primacy programs in general? Are all primacy programs also to be threatened by an end to the grant sharing?

I make decisions to accept Federal primacy programs based on the stability of our agreement with the Federal agency for the shared support of the program. Will the GAO eventually recommend the abandonment of other programs after they have been assumed by the State? Will the States lose money meant to be shared in the administration and enforcement of these programs?

If the GAO report on grant sharing by OSM is adopted, I cannot predict what the Commonwealth of Kentucky will do about its regulatory program in surface mining. In addition, I am hesitant to say what we might be forced to do about any other primacy program currently in place or up for consideration. The actions recommended in this GAO report certainly cause me to hesitate as I seek to lead Kentucky toward other programs which establish full partnerships with the Federal Government.

Mr. Chairman, I apologize for being so lengthy, but this is an important issue to the Commonwealth of Kentucky and the future of our regulatory program, so please allow me one final comment.

Senator WARNER. You may have as much time as you wish.

Ms. BALDWIN. Thank you, Mr. Chairman.

Senator WARNER. Because you've made a valuable contribution.

Ms. BALDWIN. If the GAO report is adopted and fee recovery is necessary for the State to continue its regulatory program in surface mining, it would possibly force me to recommend to Governor Collins that Kentucky's primacy program be turned back to the Federal Office of Surface Mining.

In addition, I would hesitate to continue negotiations for other primacy programs until concrete assurances on funding can be worked into these negotiations, and that actions such as those now recommended by the GAO will not occur in the future concerning Kentucky's primacy agreements. How else can Kentucky and other States expect to proceed with long-term environmental planning if we cannot trust agreements and partnership actions with Federal agencies?

The GAO recommendation is unstabilizing and counterproductive. We have made tremendous progress in Kentucky's surface mining program. We have the largest regulatory coal program in the Nation. Federal law called for repermitting of all operations under primacy, and we have accomplished that task, issuing over 2,500 permits. We're making great strides in administering the program. Adoption of the GAO recommendation could completely destabilize our entire program and undercut our progress.

Mr. Chairman, I implore you and members of your committee to take all necessary action to displace this report by proving its recommendation and rationale faulty and totally inconsistent with Federal and State efforts to protect, upgrade, and preserve our Nation's environment. Thank you.

If you have any questions, I would be happy to respond.

[The prepared statement of Ms. Baldwin follows:]

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TESTIMONY

OF

CHARLOTTE E. BALDWIN

SECRETARY

KENTUCKY NATURAL RESOURCES AND  
ENVIRONMENTAL PROTECTION CABINET

PRESENT TO

UNITED STATES SENATE SUBCOMMITTEE  
FOR NATURAL RESOURCES, DEVELOPMENT AND PRODUCTION

JULY 9, 1985

Mr. Chairman, Distinguished Committee Members, I am Charlotte E. Baldwin, Secretary of Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky. This morning I am here to voice my concern about the importance of grant sharing to states with primacy under the Federal Surface Mining Act of 1977.

I represent the concerns not only of Kentucky, but of all member states of the Interstate Mining Compact Commission of which Kentucky is the largest coal-producing state.

We are here to respond to a report by the General Accounting Office to the Chairman of the House Subcommittee on the Environment, Energy and Natural Resources. This report calls on the Federal Office of Surface Mining to begin eliminating grant sharing for states that have assumed primacy under the Federal Surface Mining Control and Reclamation Act of 1977.

There are several ways I wish to respond to this recommendation, and the first is to challenge that the principle of grant sharing was a key provision in the legislative history of the Surface Mining Act.

The Act clearly provides for a joint partnership between the federal and state governments to accomplish the coal regulatory program envisioned by Congress. Grant sharing by USM to the primacy states is mandated in Section 705(a) of the Act. Kentucky and all other primacy states accepted the terms of the Surface Mining Act based upon the understanding that 50 percent of the funds necessary to administer the program would come from Washington.

An agreement was made, both the federal and state agencies have upheld that agreement since 1977. Now the GAU recommends to undercut that agreement - an agreement that works most effectively.



An end to the 50/50 share for primacy would have wide-ranging impact on Kentucky and all other coal-producing states. This is a costly program which the states cannot fund themselves. The primacy program funding is not unlike other programs, conceived by Congress, and made available for state participation. Grant sharing is a long-standing administrative method between state and federal agencies. Kentucky is representative of other states which jointly provide environmental regulation through grant sharing agreements with federal agencies.

Kentucky's Department for Environmental Protection, housed in my Cabinet, along with the Department for Surface Mining have several grant sharing primacy programs in place. Two years ago we accepted the National Pollution Discharge Emissions System under the Clean Water Act. Currently, we are negotiating for the Federal Resource Conservation and Recovery Act which will impact Kentucky's growing problem with hazardous

waste. The surface mining primacy program is perhaps the Cabinet's largest and most comprehensive regulatory package shared with a federal agency. You can see, then, that grant sharing for primacy is not unusual among regulatory programs. Nevertheless, what is unusual is that GAO would propose to end grant sharing as a way for states and the nation to jointly remedy plaguing problems.

I have tried to understand what would provoke the GAO to make such a recommendation. One clue to their rationale is contained in the report which brings me to my second challenge to the wisdom of their recommendation.

The GAO contends that they have (quote) "long held that federal agencies should recover their cost as fully as possible whenever the goods, services or privileges benefit identifiable recipients." The report continues by citing the coal industry as the beneficiary of the state primacy programs.

Has it been so long since the Surface Mining Act was debated that some have forgotten an overriding premise of the legislation? Was it not for the benefit of the environment that the Surface Mining Act was passed? And who, then, benefits from better control of the environment during the process of mineral extraction - is it not the citizens of the several states who are the beneficiaries? From my long years of experience in the coal regions of Kentucky, I state without qualification that it is the general public who benefits from the coal primacy program. It is the public that enjoys the protection of their environment.

Why then does the GAU report propose that the coal industry is the beneficiary of the primacy program? Ask any coal producer about the primacy program and they will tell you not about the benefits of regulation, but about the sacrifices they have made to mine coal in an environmentally sound manner. The Surface Mining Act means to the coal operators more oversight,

more planning, more time delays, more expense, less profit, and less ability to compete in the world market. And yet, the GAU report suggests that since the coal industry so benefits from the Surface Mining Act, then the coal industry should pay for the federal share of the program. I contend it is the public who realizes the greatest benefit from the Surface Mining Act, and that it is the federal government's obligation to remain involved in grant sharing to bring those benefits about for the general public.

Even if this interpretation of the Act and its framework for sharing the cost of regulation is considered by some to be incorrect, then what are the consequences of withdrawing the federal share of the state's primacy program?

For the regulation of the coal industry it would mean unbelievable upheaval. The GAU report contends that the transfer of the regulatory cost from the federal agency to the

coal industry will not create production problems. This assumption is unfounded. Coal is a marketable commodity that functions in a true supply and demand market. Producers of coal must bear all costs associated with production. Coal producers hope that, when they have a marketable product, the market will bring revenues that exceed the cost of production. There are no guarantees for profit, particularly in today's coal market. Added costs of any kind to Kentucky's coal operators will cause many struggling or borderline operations to cease and will cause many profitable operations to falter.

Kentucky's coal industry is made up of 70 percent small operators. The heavy burden created by the GAU recommendation would send many of these small operators and hundreds of miners out of business.

I ask you respectively, is this the philosophy of the Surface Mining Act? Indeed it is not, and that is why the federal grant share must stay in place.



And what of primacy programs in general? Are all primacy programs also to be threatened by an end to the grant sharing?

I make decisions to accept federal primacy programs based on the stability of our agreement with the federal agency for the shared support of the program. Will the GAU eventually recommend the abandonment of other programs after they have been assumed by the state? Will the states lose money meant to be shared in the administration and enforcement of these programs?

If the GAU report on grant sharing by USM is adopted, I cannot predict what the Commonwealth of Kentucky will do about its regulatory program in surface mining. In addition, I am hesitant to say what we might be forced to do about any other primacy program currently in place or up for consideration. The actions recommended in this GAU report certainly cause me to hesitate as I seek to lead Kentucky towards other programs which establish full partnerships with the federal government.

Mr. Chairman, I apologize for being so lengthy, but this is an important issue to the Commonwealth of Kentucky and the future of our regulatory program, so please allow me one final comment.

If the GAU report is adopted and fee recovery is necessary for the state to continue its regulatory program in surface mining, it would possibly force me to recommend to Governor Collins that Kentucky's primacy program be turned back to the Federal Office of Surface Mining.

In addition, I would hesitate to continue negotiations for other primacy programs until concrete assurances on funding can be worked into these negotiations, and that actions such as those now recommended by the GAU will not occur in the future concerning Kentucky's primacy agreements. How else can Kentucky and other states expect to proceed with long-term environmental planning if we cannot trust agreements and partnership actions with federal agencies?

The GAU recommendation is unstabilizing and counter productive. We have made tremendous progress in Kentucky's surface mining program. We have the largest coal regulatory program in the nation. Federal law called for re-permitting of all operations under primacy, and we have accomplished that task, issuing over 2500 permits. We are making great strides in administering the program. Adoption of the GAU recommendation could completely destabilize our entire program and undercut our progress.

Mr. Chairman, I implore you and members of your committee to take all necessary action to displace this report by proving its recommendation and rationale faulty and totally inconsistent with federal and state efforts to protect, upgrade, and preserve our nation's environment.

Senator WARNER. I'll defer to my distinguished colleague from Kentucky to lead off.

Senator FORD. Secretary Baldwin, what is your judgment of the loss of coal production in your State if this regulation goes into effect? Is 840,000 tons reasonably accurate, or do you think it would be more than that?

Ms. BALDWIN. I think it would be considerably more than that, Senator Ford, with our transportation costs that Kentucky faces in reaching the market and the tremendous financial burden of preparing to mine, the financial capital that's involved with the risk being there, the market not being projectable, that a profit is there to be made.

I think the risk would be greater than anyone other than the very largest of coal operators could bear.

Senator FORD. It seems ironic to me—and I allude again to the chairman's opening statement—where we send hundreds of millions of dollars to foreign countries to go in the coal business in competition with us. We're trying to get a piddling sum from our operators and our producers, and in turn we will put them out of business.

And even the admission this morning of those who propose it, the loss to Kentucky is just unacceptable to me and I feel like it is to you.

Do you find that there is beginning to be a policy and—if I could use this word—"reneging" on agreements with the Federal Government?

Ms. BALDWIN. That's a considerable concern of mine, particularly as I view the primacy programs that we're involved and the commitment of the State funds from its general revenues.

Once we're locked into place, if the Federal Government reneges or changes the formula, we are unprepared to deal with it. Kentucky simply doesn't have the revenues to contribute 100 percent of the program. And to increase the fees to subsidize that, in effect does the same thing as the Federal Government trying to do that. It undercuts the stability of the industry—and not only the coal operators themselves—the support industry, the trucking industry, the service industries to mining machinery and equipment. All of that is devastated by any slowdown or stoppage of production of coal.

I think if the coal industry is impacted in the State of Kentucky, it would be absolutely devastating to our Kentucky economy.

Senator FORD. You're talking about two things—the rippling effect for other areas, and the bankruptcies that probably would occur in the reduction of capital as it relates to those whom the operators secured loan from.

Mr. Chairman, I thank you for allowing me to question Secretary Baldwin. I thank her for coming today and giving her very fine testimony.

Senator WARNER. Governor Rockefeller.

Senator ROCKEFELLER. No questions, Mr. Chairman.

Senator WARNER. We thank you, Madame Secretary. We thank you for coming up and we wish you a safe journey back.

Mr. Faerber.

STATEMENT OF KENNETH R. FAERBER, SPECIAL ASSISTANT TO  
GOV. ARCH A. MOORE, STATE OF WEST VIRGINIA, ON  
BEHALF OF THE INTERSTATE MINING COMPACT COMMISSION

Mr. FAERBER. Mr. Chairman, members of the subcommittee, thank you for inviting me today. I am here on behalf of the Interstate Mining Compact Commission of which West Virginia is a member State.

The Interstate Mining Compact Commission is composed of 17 members: Arkansas, Louisiana, New Mexico, Illinois, Alabama, Texas, Tennessee, Indiana, Kentucky, North Carolina, West Virginia, Maryland, Oklahoma, South Carolina, Pennsylvania, Ohio, and Virginia.

If I may ask, having submitted my testimony in writing, I'd like to summarize and acknowledge Secretary Baldwin's appropriate testimony.

I think there's three main points that need to be covered in addressing GAO's report. There are three flaws that seem to stand out that we've heard in all the discussions today. Those relate to primarily the benefit that's been attributed to the coal producers receiving the privilege of paying for permits suddenly.

I would like to suggest that, having been active in Public Law 95-86 drafting and thoroughly familiar with the implementation of the regulations, that there was in no way an intent on Congress' part to withdraw funding at this time or at any point in the future.

The mere idea that it is a privilege for coal operators to pay for permits, I am sure is flawed. I would question the previous testimony in which they said they contacted industry and did not find—and industry did not find fault. I would suggest that in the State of West Virginia and in the State of Kentucky, you would be hard-pressed to find any operator that would agree to those findings.

Second, the findings that implementation of their proposal would not place an economic burden on the industry or on the States is not well based. Although the estimate on average is 11.7 cents, they amply pointed out that the range could go from 3 cents to possibly as high as a dollar.

One of the interesting aspects of Public Law 95-87 and its implementation from the beginning was to provide uniformity to the coal industry. This uniformity was not only in the means of a standardization of performance standards as it relates to environmental regulations, it also related to the economic stability of the coal industry throughout the coal regions.

If we have a change in this funding mechanism on Federal grants, I would propose that you would see a sudden change in the uniformity between States and the regulations thereof. It is a well-known fact, as Senator Ford pointed out, that an 11.7-cent difference in coal price is a major factor in determining contracts. Recently, Southern Utilities took bids on coal contracts in which there were 42 prospective bidders making application. An 11-cent difference would make a tremendous impact.

I think the third and most important flaw in the GAO report is the failure of its drafters to grasp a clear understanding of the relationship between the States and the Federal Office of Surface Mining. If the GAO recommendations are implemented, the work-



ing relationship which is involved between the States and OSM will be replaced by the same chaos and confusion which prevailed during the formative years following passage of the act.

I think it's important to note that although we have been troubled with OSM and we remain troubled with OSM, I do believe that the States, through time, have reached a working point that they have been able to operate their programs and are beginning to operate them on an effective basis.

I speak for West Virginia. The recent cooperation which we've seen with OSM, we would not want to impair that relationship for the sake of returning our primacy. We do not propose that the primacy that Senator Rockefeller, Governor Rockefeller worked hard to achieve, that that be turned back. It has been an important aspect of protecting the public and the environment and we think it's significant that that continue.

However, we do not feel that in any way, the withdrawal of Federal grant money under this program, could we continue to tolerate the demands placed on OSM by Public Law 95-87 and subsequently on the State for the reporting requirements that add to the cost of coal.

Determining the actual cost to the State for implementing regulatory programs on a permit-by-permit basis would require additional record keeping and record processing. The costs of developing the system for accomplishing this task was not factored into GAO's cost analysis. A fee collection system is even more costly in terms of time and money, and infinitely more problematic to implement.

It is a foregone conclusion that a certain portion of the fees will be uncollectible. This being a reality, it renders the States vulnerable to criticism and litigation for failure to collect all fees. OSM's experience in collecting civil penalties should be sufficient illustration of the impossibility of this approach.

Budget projections create another impossibility because there is no way to accurately reflect revenues. Market forces can dramatically alter the number of companies in default or bankruptcy. Companies can alter this permitting strategy, resulting in fewer permits and throwing off budget projections.

These are obvious accounting impossibilities which will result in budgetary fluctuations that the States will be unable to anticipate.

The proposed GAO report will require legislative actions in all States to comply. Even if it is passed, I would strongly suggest that any State legislature meeting the lobbying effort of the coal industry would be able to pass appropriate legislation to fulfill the requirements of this proposal.

In closing, I'd like to say the compact and its member States would like to offer a more rational approach and one that will be in keeping with the administration's objectives. It is our suggestion that GAO review various programs now being administered by OSM and evaluate them on the basis of their cost effectiveness. When deficiencies exist, an effort should be made to explore mechanisms for reducing costs while maintaining the integrity of the programs.

Also, GAO should examine the administration of the Surface Mining Act and propose amendments which are designed to elimi-

nate many of the costly and burdensome reporting, recordkeeping, and other nonessential requirements which are imposed upon OSM and the States. We believe that cost savings could be realized that far exceed those contemplated by the full cost recovery scheme.

The compact and its member States can offer many suggestions on where adjustments should be made. This would not only result in major savings at the Federal level, but also at the State level, while achieving the objective of this proposal in reducing the expenditures under the grants program.

The compact wishes to make it clear to this subcommittee that it is fully in support of finding more cost-effective ways to carry on the businesses of government, both at the State level and Federal level. However, the testimony given here convincingly illustrates that the measures advanced by this report lack the detailed insight necessary to achieve the objective of cost reduction, while maintaining the integrity of the program through cooperative State and Federal relations.

Mr. Chairman, thank you for your time.

[The prepared statement of Mr. Faerber follows:]



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July 9, 1985

### TESTIMONY TO BE PRESENTED BEFORE THE SENATE SUBCOMMITTEE ON ENERGY AND NATURAL RESOURCES

My name is Kenneth R. Faerber and I am currently employed as a Special Assistant to Arch A. Moore Jr., Governor of the State of West Virginia. I appear before this Subcommittee today on behalf of the Interstate Mining Compact Commission of which West Virginia is a member state.

My testimony today addresses the Compact's concerns regarding The General Accounting Office's report to this Subcommittee entitled, "The Department of Interior's Office of Surface Mining Should More Fully Recover Or Eliminate Its Cost of Regulating Coal Mining". As you are probably aware the Compact and its member states are fundamentally opposed to the recommendations made in the subject report. I would like to discuss with you some of the reasons why we have taken this position.

Let me begin by making some general comments on the report which I will elaborate on in later remarks. There are three major flaws in the findings

of this report which make its implementation impractical, if not impossible. The first of these is GAO's basic premise that the permitting and regulatory programs mandated by the Federal Surface Mining Act (P L 95-87) primarily benefit the coal industry. Even a cursory review of the legislative history of the Act itself should make it clear that this is not the case. The language of the Act places great emphasis on protection of the public and the environment from the adverse impacts of mining. These impacts were viewed by the authors and sponsors of P L 95-87 as being a national problem and invariably they opted for public good over individual and state's rights. Those states which gave their support to passage of the Act, did so because of a recognized need for uniformity of regulatory programs among the states and not because the Act provided any specific benefits to the industry.

Secondly, GAO's finding that implementation of their proposal would not place an economic burden on the industry and/or the states is not well based. The estimate of 11.7 cents per ton average cost represents a rather significant cost. This is an "up-front" cost which must be borne by the permit applicant and not a cost that can be passed on or amortized over the entire infrastructure of the mining industry as GAO has suggested. To a small or medium sized coal company this represents the difference between a profit or loss during this period of depressed coal prices. To the states which must operate on balanced budgets, the scenario advanced by this report represents an accounting impossibility.

The most important flaws in the GAO report is the failure of its drafters to grasp a clear understanding of the relationship between the states and the Federal Office of Surface Mining (OSM). If the GAO recommendations are implemented, the working relationship which has evolved between the states and OSM will be replaced by the same chaos and confusion which prevailed during the formative years following passage of the Act. Also, program

performance among the states will vary depending on the ability of each state to financially support a given performance level. The result will be the loss of uniformity which was the over-riding reason for supporting the Act in the first place.

Before I go into the specific reasons for making the foregoing statements, let me clarify for the Subcommittee one important point. The Compact and its member states are not opposed to GAO's basic concept of reducing the expenditure of federal funds for implementing the Surface Mining Act. We support the Reagan administration's basic philosophy of reducing costs, eliminating overly burdensome regulation, improving efficiency of government programs, and maintaining effective and responsible management. Furthermore, we view these objectives to be inseparable. Unfortunately, the approach under discussion here addresses only the cost reduction aspects and ignores its impacts on the other objectives.

Having made this point, let me proceed now to some specific examples of where we feel that the full cost recovery proposal advanced in this report is either unacceptable or unworkable.

GAO's position that the mining industry is the primary beneficiary of implementation of the Surface Mining Act is fundamentally inaccurate. I doubt that you will find anyone in the industry who feels that the Act has been helpful to them. Many states, in which the coal industry is an important segment of the economy, have expressed grave concerns about the overly restrictive nature of the Act and its impact on that industry. The authors and sponsors of this legislation were primarily concerned with public awareness, public protection, and environmental preservation. The prevailing argument was that individual states were not providing adequate protection to its citizens and that the adverse impacts of mining operations on the environment were threatening the services of national programs sponsored under



the Clean Water Act, NEPA, and others. The regulation of mining operations was viewed as a national problem requiring generation and expenditure of massive sums of money in order to encourage states to adopt the federal Act and thereby establishing a consistent and uniform program throughout the country. In view of these facts, it seems more appropriate to deduce that the public at large is the primary recipient of the benefits of the Act and not the mining industry.

Also, one cannot ignore the benefits to the public in terms of improved land reclamation which results in improved productivity and increased value of mined lands. Improvements in wildlife utilization, recreational developments, and water quality must also be considered public benefits.

In view of these examples, it should be clear to this Subcommittee that this report has previously erred in making one of its fundamental observations.

I want to turn now to another important aspect of the GAO report of which I believe this subcommittee should be made aware. The cost of implementing full cost recovery as proposed in this report will place an economic hardship on the coal industry. I can assure you that you will not find anyone in the industry today who would agree that GAO's projected 11.7 cents per ton is an insignificant economic factor. Using that figure and taking as an example a small coal operator who produces in the neighborhood of 100,000 tons of coal annually as an example, we can see an immediate up-front cost of \$11,000 per year. In today's competitive market that could be the difference between a profit and a loss. It indeed is not an insignificant factor. In considering their costs it is important for this Subcommittee and GAO to recognize that coal prices have dropped dramatically since the Act was passed in 1977. This factor has been further compounded by escalating production costs. In considering all these factors one quickly realizes that an "add-on" cost

to the industry at this time is not conducive to a healthy coal economy. Furthermore, to say that these costs are pass-through costs is an oversimplification of the issue and reflects the lack of research done in preparing this report. For small coal operators who depend heavily on the spot market these costs are truly up-front costs and can in no way be passed through. For larger operators producing under long term contracts these kinds of costs are generally not covered in escalation clauses. Many of these contracts are for ten years or more; so that recovery, at least for the short term, is not possible. More importantly, if GAO truly believes that their costs are pass-through costs, the ultimate economic burden falls on the consuming public--the very ones GAO purports to be helping. From the standpoint of the states, the full cost recovery concept represents a number of difficult problems; some of which are unresolvable. From the outset, one must recognize that most states operate on balanced budgets; therefore, shortfalls in special revenue accounts are unacceptable, and in fact, illegal. This represents a major problem for most states; because not only do they have to devise ways to determine costs, and collect fees, they must project budgets two to five years in advance.

Determining actual costs to the state for implementing regulatory programs on a permit by permit basis would require additional record keeping and record processing. The cost of developing a system for accomplishing this task was not factored into GAO's cost analysis. A fee collection system is even more costly in terms of time and money and infinitely more problematic to implement. It is a foregone conclusion that a certain portion of the fees will be uncollectable. This being a reality, it renders the states vulnerable to criticism and litigation for failure to collect all fees. OSM's experience in collecting civil penalties should be sufficient illustration of the

impossibility of this approach. Budget projection creates another impossibility because there is no way to accurately project revenues. Market forces can dramatically alter the number of companies in default or bankruptcy. Companies can alter their permitting strategy resulting in fewer permits and throwing off budget projections. These are obvious accounting impossibilities which will result in budgetary fluctuations that the states will be unable to anticipate.

Another major problem for the states in implementing full cost recovery is that most states have flat rate permit fees set by statute. Adopting the GAO proposal in this instance would require legislative action. It is doubtful that any state could overcome an industry lobbying effort which opposes such statutory amendments. Even without the industry lobby most legislative bodies would find difficulty in supporting such a proposal. Also, legislative action always invites the possibility of statute amendments which are undesirable and inconsistent with the state's federally approved program.

Again, we illustrate the fallacy in one of GAO's fundamental assumptions. This issue alone should be sufficient to convince the subcommittee that GAO has not done their homework on this proposal. At the very least a more careful and detailed cost analysis is necessary, and is strongly recommended.

Perhaps the most glaring oversight in the GAO report is the fact that it is a "quick fix" approach to reducing budget deficits. It is obvious from the state's perspective that many resulting repercussions have been overlooked.

In the aftermath of passage of the federal Surface Mining Act, OSM and the states went through a chaotic period of controversy and confusion. After endless debates, administrative turnovers, and regulatory reform there has evolved a working partnership between the states and their federal counterparts. State and federal statutes and regulations are now established and policies and procedures well developed. Although some matters remain at

issue there is now a relatively stable understanding between the governmental entities, and industry, on the operation of the various programs developed under the Act. The full cost recovery concept threatens to return us to a situation of chaos and conflict. The states will find themselves in a position of trying to enact enabling legislation and modifying programs, while OSM will be required to force the states into adopting policies and procedures consistent with federal mandates. The results will be that the states will achieve various levels of success in meeting the federal requirements and a loss of the uniformity for which the Act was originally conceived. This situation will result in a higher cost to the general public in the individual states, and therefore nationwide, without achieving the administrations objective of less costly and burdensome government. These points again illustrate that the passage of the Act was a recognition of a national problem. In that context it was only reasonable to expect that the cost of implementation should be paid for out of the general fund. State primacy could not have been achieved without federal funding. Now that primacy programs are in effect and working, withdrawal of funding not only places the states in a difficult economical position, it would also disrupt their programs. Continued federal funding of these programs may not have been guaranteed by the Act; however, it was certainly implied. The states have come to depend on this source of revenue for the success and continuation of their programs. Loss of these revenues may force many states to withdraw from their primacy status. GAO should carefully consider these impacts in formulating an approach to deficit reduction.

The Compact and its member states would like to offer a more rational approach and one that will be in keeping with the administrations objectives. It is our suggestion that GAO review the various programs now being

administered by OSM and evaluate them on the basis of their cost effectiveness. When deficiencies exist, an effort should be made to explore mechanisms for reducing costs while maintaining the integrity of the programs. Also GAO should examine the administration of the Surface Mining Act and propose amendments which are designed to eliminate many of the costly and burdensome reporting, record keeping, and other non-essential requirements which are imposed upon OSM and the states. We believe that cost savings could be realized that far exceed those contemplated by the full cost recovery scheme. The Compact and its member states can offer many suggestions on where adjustment should be made. This would not only result in major savings at the federal level but also at the state level while achieving the objective of this proposal in reducing the expenditures under the grants program.

The compact wishes to make it clear to this subcommittee that it is fully in support of finding more cost effective ways to carry on the business of government, both at the state and federal level; however, the testimony given here convincingly illustrates that the measures advanced by this report lack the detailed insight necessary to achieve the objective of cost reduction while maintaining the integrity of the program through cooperative state and federal relations.



Senator WARNER. Senator Rockefeller, would you like to lead off with the questioning?

Senator ROCKEFELLER. Thank you, Mr. Chairman. And I am very pleased, Mr. Faerber, that you are here today, both to represent the compact and also the State of West Virginia.

Just looking at your testimony in a couple of places, you don't know of any other industry in your own professional and private experience, do you, where this type—other than the nuclear—where this type of requirement would be made? That is, the paying of the fees if this were to take effect?

Mr. FAERBER. No, sir, Senator Rockefeller. In all the environmental-related permitting agencies, regulatory agencies, to my knowledge this is the first that this has been proposed in.

Senator ROCKEFELLER. You mentioned during your testimony that the relationship with OSM is now more smooth than in the early days of the Surface Mining Act and—I forget your exact words—but I would agree with that. I can remember a time, a prior time when it was a very chaotic relationship. And now primacy is established, it seems to be more smooth. I never had any problems at all with OSM. I don't imagine that Governor Moore is having any insurmountable problems with OSM. It seems to be a good relationship.

Isn't it your view that if for the GAO stated purpose of a \$9.4 million savings on a phase I program we were to potentially throw that whole relationship back into chaos, that would hardly seem like a reasonable tradeoff, would it, on a national basis, much less for our State of West Virginia?

Mr. FAERBER. It certainly would not be a wise tradeoff, Senator. The relationship that OSM has developed has been a strained one, but over the past years, I think States have accepted the office space in which they're to work in and office space in which OSM is to work in. There still is a duplication of requirements which we feel are unnecessary and believe that OSM themselves could be responsible and help to straighten that out.

I'd like to point out that I think that there is a significant difference between what OSM is proposing themselves and this GAO report. The GAO goes far beyond what OSM has proposed.

In looking at what GAO—as Senator Ford so amply questioned these people—I don't think they have any understanding of what's involved in the coal industry. I don't think they have any understanding that 11.7 cents does make a difference if you're 1 of 40 bidders on a contract and if in your State your permitting cost is 11.7, and the next State over is 2 cents, you've lost a bid.

Senator ROCKEFELLER. Which is not to say, in agreeing with you, which is not to say that there are not other things which we have to address with respect to the price of coal; that is, transportation and other aspects. But every single cent makes a difference, particularly with the price of oil where it is and the flat nature of the industry.

For example, just running out a small increase in the cost of operations to the coal industry in West Virginia, which has risen 60 percent nationally; we've seen a major impact in our State. We tend to be 80 percent deep mining, 20 percent surface mining, but you run that out in West Virginia on small operations, you see

that closing more mines, not just making it more difficult for them to compete, but closing more mines.

Do you see that happening—or am I putting words in your mouth?

Mr. FAERBER. No, sir; not at all. Yes, sir; very much so. As a matter of fact, the Department of Energy's report, 1984 report on coal production, clearly indicates that since 1977, between 1977 and the passage of the act in 1983, while coal production in the United States at a rate of about 13 percent, production from small operators, those producing less than 200,000 tons, went down anywhere from 25 to 42 percent.

In the 200 to 500,000 ton range, again a small operator, I feel, the production went down approximately 25-30 percent. One of the significant side aspects of this, I believe, is the employment picture. If you look at a production in which a mine produces 1 million tons, and you have an equal number of small mines producing that same tonnage, the total number of employees in those small companies would be much greater than it would take for the employees of that one large company.

So as you remove the small operators, you're reducing the total number of jobs in the coal industry by a significant basis. That wasn't brought out, but I think it is a very significant factor.

Senator ROCKEFELLER. On page 6 of your testimony you refer to—and I understand, of course, the difference between the GAO and OSM view and it was my general impression that OSM evidenced some reluctance as to the direction of this, although perhaps they were not entirely free to speak, but in any event you refer to the GAO report as a sort of a quick fix approach to reducing budget deficits, wherein I take it that you agree that this is a part of a budget reduction type effort.

Mr. FAERBER. Absolutely. Yes, sir.

Senator ROCKEFELLER. OK.

Then earlier in your testimony on page 3, you also said "The Compact and its member States are not opposed to GAO's basic concept of reducing the expenditure of Federal funds for implementing the Surface Mining Act. We support the Reagan administration's basic philosophy of reducing costs, eliminating overly burdensome regulations, improving efficiency of Government programs, and maintaining effective responsible management. Furthermore, we view these objectives to be inseparable. Unfortunately, the approach under discussion here addresses only the cost reduction aspects and ignores the impacts."

Now, I'm just having a bit of trouble with the infusion of the basic philosophy, support for reducing costs, while at the same time saying that this is a budget reduction mechanism and you oppose it, as do I oppose it, and so I wondered was there anything in the Reagan administration's basic philosophy of reducing costs with respect to coal that you support?

I mean I look at the budget for clean coal technology, and it's not funded, research and development is down 42 percent from last year; clean coal technology is nonexistent for the time. What was it that you had in mind?

Mr. FAERBER. Well, what we had in mind in that statement is simply that the cost reductions that the President is looking

toward, I think that everyone supports in principle. The mechanism you go about to achieve those results have varied course.

One aspect that could be followed would be merely to allow the States, through their primacy, to act on their own program. Senator Ford, in his questioning earlier, indicated that although we have uniform performance standards and uniformity within the industry, which was the basis of Public Law 95-87, OSM is being told that you have to follow various reporting requirements and submittal of paperwork, various inspection-related activities, and they in turn are passing that on to the State.

In a true sense of primacy, if the State were able to do that and do that on their own, even through Federal funding or 50 percent grant, the cost could be reduced from, say, \$10 million to \$5 million if the States were allowed to act on their own.

Senator ROCKEFELLER. Would it be your advice to the Governor of West Virginia, that if phase II, as described by GAO, came into being, would you advise him to return or relinquish primacy back to the Federal Government?

Mr. FAERBER. That would be an extremely difficult decision to make at this time. I would have to look a lot closer before I would make the commitment to relinquish primacy.

Senator ROCKEFELLER. Thank you, Mr. Faerber. Thank you for your presence and for your points that you've made.

Thank you, Mr. Chairman.

Senator WARNER. We thank the panel and we wish them a safe return.

We'll now have panel No. II, Mr. Gerkin, Mr. Young, and Mr. Lyon.

Gentlemen, there is an understandable consistency in your statements, which statements will be submitted for the record in complete form. I'm wondering if you can't, rather succinctly, summarize what points you feel may not have been covered thus far in the hearing. And we'll lead off with Mr. Gerkin.

#### STATEMENT OF DANIEL R. GERKIN, PRESIDENT, MINING AND RECLAMATION COUNCIL OF AMERICA

Mr. GERKIN. Thank you, Mr. Chairman. I am Dan Gerkin, president of the Mining and Reclamation Council of America. We appreciate the opportunity to appear here today. We appreciate your interest and leadership on this issue, to object to OSM's proposed rule and the GAO recommendation for recovering costs for administering the Federal Surface Mining Program.

A detailed review of our concerns is in the appendix to my statement for the record. Also, additional major considerations will be presented by the next panel of coal operators from the three coal producing States.

I will summarize our major concerns very briefly. First of all, the assertion by OSM and GAO that the coal industry is the beneficiary of the Federal Surface Mining Program is certainly one of the most bizarre examples of bureaucratic logic on record. I can assure you the coal industry does not see itself the beneficiary of this program.

Rather, we find ourselves the victim of a program that controls virtually every phase of our operation, yet often is incapable of rendering a clear decision on how the work is to be done. A program that is a source of costly delays for obtaining permits; adds needlessly to production costs, and often requires unsound mining and reclamation practices; threatens to shut down multimillion dollar operations on a regular basis; based on an inspector's interpretation of ever-changing regulatory statute. A program that continues—

Senator WARNER. Mr. Gerkin, those are points, I think, that have been stressed very well. You could be most helpful if you were to select out the points that you feel have not been covered, recognizing that your statement will be included in the record in its entirety.

Mr. GERKIN. All right, Mr. Chairman.

Well, we certainly agree with previous speakers that there has not been an adequate economic and regulatory impact analysis. The fee impact recovery proposal is certainly ill-conceived and will cause many problems.

I think the point that I'd like to make today, which has also been touched on, but it'll just take me a minute or two, looking at our membership, Mr. Chairman, you're aware that we represent mostly small to midsize coal producers. Our segment of the industry is clearly under siege, we believe, by the lawmakers and the rule writers.

Beginning in 1969 with the Mine Safety Act, black lung, clean air, clean water, all the way down through SMCRA in 1977, the Federal programs have come at us, one after another. Today, an operator faces 28 major Federal regulatory programs, 20 agencies that have jurisdiction over—

Senator WARNER. You're reading my opening statement.

Mr. GERKIN. Yes, I know, sir, but I think the point is well-made. I think these programs were sound in concept, to try to balance the need for development of our resources, but over the years in their implementation and expansion, whether by congressional action, by administrative fiat, or judicial fiat, they're slowly and steadily killing the small operator segment of the coal industry.

Let me repeat a couple of the most disturbing statistics that have already been noted. But since 1977, 60 percent of the small coal mines have been closed down. Between 1977 and 1983, while nationwide coal production grew by nearly 15 percent, companies producing less than 200,000 tons realized a dramatic decrease in nationwide production share of nearly 35 percent. Medium companies lost about 10 percent of production share.

Ten years ago, 7,000 producers were in business. Today, less than 3,600. And as onerous as the proposed GAO and OSM fees might be, they represent, interestingly, only a portion of the potential additional tax increases facing the coal industry in this Congress. The others include a 50-percent increase in the black lung tax; proposed user fees for port and channel construction and inland waterway improvements; proposed inclusion of the coal industry under the Superfund tax; significant royalty adjustments on Federal coal; and, of course, the loss of capital gains tax treatment for coal royal-



ty income; and the coal depletion allowance that's been proposed in the President's tax package.

I think this is not a case of the industry crying wolf, Mr. Chairman. The statistics that I've cited and the record number of coal company cases on the dockets of bankruptcy court is clear testimony to the impact and the problems that we're facing. The ramifications of these proposals are one more stone on the pile. We think they are significant. They are major policy changes that should not be affected by administrative fiat, and we recommend and encourage this subcommittee to communicate with the administration in the strongest terms possible your opposition to these proposals. Thank you very much.

[The prepared statement of Mr. Gerkin follows:]

Statement

Daniel R. Gerkin  
President  
MINING AND RECLAMATION COUNCIL OF AMERICA  
(MARC)

Oversight Hearing on Proposals  
for Cost Recovery of Administering  
of the Surface Mining Program

Subcommittee on Natural Resources  
Development and Production  
Committee on Energy and Natural Resources



Chairman Warner, members of the Subcommittee, I am Dan Gerkin, President of the Mining and Reclamation Council of America (MARC). MARC is a national association of coal producers and ancilliary industries whose membership and 31 affiliate state associations produced approximately 60 percent of the Nation's coal last year.

We appreciate the opportunity to appear today to object to OSM's proposed rule on permit fees as well as GAO's recommendations for recovering the costs of administering the federal surface mining program. A detailed and thorough review of our specific concerns is contained in the appendix to my statement for the record. Also, additional major considerations will be presented by the next panel, which includes coal operators from the states of Washington and Tennessee, where OSM is the regulatory authority, and Montana, which is a cooperative agreement state.

I will briefly summarize our major concerns then make a few additional comments regarding continuing federal policies that, if not redirected, will ultimately force literally thousands of coal producers out of business.

First of all, the assertion by both OSM and GAO that the coal industry is the prime beneficiary of the federal surface mining program must be one of the most bizarre examples of bureaucratic logic on record. I can assure you that the industry does not see itself as the beneficiary of this program. Rather, we find ourselves the victim of a program that controls virtually every phase of our operation but often is incapable of rendering a clear decision on how the work is to be done. A program that is the source of costly delays for obtaining permits; adds needlessly to production costs and often requires unsound mining and reclamation practices; threatens to shut

down multi-million dollar operations on a regular basis based on an inspector's interpretation of ever-changing regulatory standards. A program that continues to subject us to disputes and turf fights between state and federal agencies, and has rendered the term "state primacy" virtually meaningless and a program that has not given the industry one day of certainty or stability in its eight year history.

The coal industry is not the beneficiary of this program and I think I can say with some certainty that Congress never envisioned the convoluted logic proposed by OSM. In enacting SMCRA in 1977, the Congress in Sec. 102(a) stated that the purpose of the Act was to:

"Establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations;" [Emphasis added.]

and in Sec. 102(m) it stated that:

whenever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations." [Emphasis added.]

At no place in the Act, or its legislative history, did the Congress indicate that it considered coal operators to be the beneficiary of the Act. The general public is clearly the overwhelming beneficiary of the numerous and thorough reviews of an operator's mining, reclamation and environmental control plans. In fact, the permit approval process conducted by the government is generally less costly and time consuming than the work coal operators must do just to prepare and submit a permit for OSM review.

In order to justify their proposals, OSM and GAO rely on Sec. 507(a) of SMCRA, the Independent Offices Appropriation Act (IOAA), and Budget Circular

A-25 for authority for proposed cost recovery fees. However, coal operators do not derive the special limited benefits not available to the public at large as required by the IOAA and subsequent court decisions. Under our legal system, the right to mine exists by reason of ownership of the mineral rights. A SMCRA permit is a set of conditions imposed on an operator's pre-existing right to mine. These conditions clearly benefit the public, not the operator.

Second, considering the complexity of the issue and the far-reaching impact on the coal industry and the twenty-five states involved, neither agency conducted an adequate analysis of the economic and regulatory impacts. OSM collected only four months of data on which to base its permit review cost estimates. GAO, during its eighteen month study, managed to talk to only seven coal companies out of more than 3,000 on which it based its cost impact estimates and recommendations. It is inconceivable that these proposals could go forward without a thorough analytical review.

Third, we believe OSM's permit fee recovery proposal is ill-conceived, unfair and very likely impossible to administer. It would eliminate any incentive for the agency to incorporate fiscal accountability and cost efficiencies into its permit review activities. Whether it's a fixed fee or actual costs system, many unanswered questions remain. How much will be charged? Is there a system to account for actual costs? What about indirect costs and overhead? Who will pay for review of comments and petitions from citizens groups? Does OSM have a billing system that will work?

Fourth, GAO, in addition to suggesting cost recovery where OSM is the regulatory authority, recommended the recovery of additional costs through elimination of state program and cooperative agreement grants. GAO

acknowledges that such action could jeopardize one of the cornerstones of SMCRA, state primacy, by effectively encouraging states to forfeit primacy to the federal government. MARC believes that in the case of many states, this is a distinct possibility. Without state program grants, coal producers will be taxed in order to pay for the privilege of being regulated by the federal government.

Mr. Chairman, the majority of MARC's members are small to mid-sized coal producers and our segment of the industry is clearly under seige by the law makers and the rule-writers. Beginning in 1969, the federal programs have come at us one right after the other. Mine safety, black lung, clean air, clean water, endangered species, federal coal leasing amendments, hazardous waste and of course SMCRA. Today a coal operator faces 28 major federal regulatory programs and 20 federal agencies with jurisdiction over them. And there are literally hundreds of corresponding and overlapping laws, programs and agencies at the state and local level. These programs were all sound in concept and sought to strike a balance between the need to economically develop our resources and to protect the environment and the coal industry workforce. However, over the years, their implementation and expansion, whether by Congressional action or by Administrative and Judicial fiat is slowly, steadily and selectively killing the small operator segment of the U.S. coal industry.

Since 1977, 60% of the small coal mines (those producing less than 100,000 tons per year) have closed. Between 1977 and 1983, while nationwide coal production grew by over 15%, companies producing less than 200,000 tons per year experienced a dramatic decline in nationwide production share of

approximately 35%. Producers in the 200,000 to 500,000 ton per year range lost 10% of production share. Ten years ago there were over 7,000 coal producing companies in the U.S. -- today there are less than 3,600.

As onerous as these proposed fees might be, they represent only a portion of the potential tax increases facing coal in this Congress. Others include a 50% increase in the black lung tax; proposed user fees for port and channel construction and inland waterway improvements; proposed inclusion of coal and all other produced or manufactured goods in the Super Fund Tax; significant royalty adjustments on federal coal; and, of course, the loss of capital gains tax treatment on coal royalty income and the coal depletion allowance proposed in the President's tax package.

Mr. Chairman, this is not a case of the industry crying wolf. The disturbing statistics I have cited and the record number of coal company cases on the dockets of bankruptcy courts is clear testimony to the cumulative impact of over-regulation and over-taxation on one of our most important basic industries. If implemented, the proposals by OSM and GAO would certainly add to the growing list of casualties.

We believe the ramifications of these proposals are extremely significant. Such major policy changes should not be effected by Administrative fiat, but should occur only following consideration and action by Congress. We urge this subcommittee to communicate to the Administration in the strongest possible terms, its opposition to the proposed permit fees and full cost recovery under the federal surface mining program.



PERMIT FEE CONCERNS

Appendix to Statement of Daniel Gerkin  
 Subcommittee on Natural Resources and Development  
 July 9, 1985

## I.

Inappropriate Identification of Primary Beneficiary

OSM's proposals fail to recognize the true beneficiaries of surface coal mine regulation. The general public is clearly the overwhelming beneficiary of the numerous and thorough governmental reviews of an operators' mining, reclamation and environmental control plans. In fact, the permit approval process conducted by the government is generally less costly and time consuming than the work permit applicants must do for the required environmental studies, monitoring, environmental impact statements, etc. Yet OSM neglected to even consider these costs in its regulatory analysis.

As appropriately set forth by Congress in Section 102(a) of the Surface Mining Act, the statute and subsequent regulatory program were established to ensure that the health, safety and welfare of the public would be protected during and after mining activities. Thus, many of the costs OSM incurs are for services specifically related to the welfare of the residents near the planned mine site, rather than being directly attributable to the permit applicant.

Mine regulation has brought with it a host of other societal benefits, such as improvements in wildlife habitat, better agricultural land, research to expand man's knowledge of toxic materials handling, and the management of different types of disturbed land. OSM's cost recovery proposals have failed to consider any of these costs incurred by the industry to the benefit of the public. MARC suggests OSM properly define such public interest costs and include them in a more accurate and thorough analysis.

OSM bases its authority to implement a cost recovery program from Section 507(a) of SMCRA, from the Independent Offices Appropriation Act (IOAA) of 1952, and the Bureau of the Budget's Circular A-25 implementing the IOAA, as well as several court cases. Nonetheless, MARC asserts that mine regulation is not subject to the concept of a "user fee," inasmuch as operators do not derive special limited benefits from the regulatory authority, as specified by the IOAA and subsequent court decisions. While OSM cites cases dealing with the

appropriateness of recovering fees, most of these involved the receipt of specific licenses or privileges. In fact, Bureau of the Budget Circular A-25 states that a special service exists when the agency's action "enables the beneficiary to obtain more immediate or substantial gains or values, which may or may not be measurable in monetary terms, than those which accrue to the general public. Surface coal mining regulation is distinctly different. The right to mine exists by reason of ownership of mining rights. The SMCRA permit is a set of conditions imposed on an applicant's pre-existing right to mine which clearly benefits the public more than the operator.

Further, similar programs established subsequent to the IOAA's passage have been found unconstitutional. Two benchmark decisions were issued by the U.S. Supreme Court in 1974 concerning cost recovery regulations, National Cable Television Association, Inc. v. U.S. and Federal Power Commission v. New England Power Co. In both cases the Court invalidated the cost recovery program on the basis of the delegation doctrine of the U.S. Constitution (Article I, Sec.8, Clause 1). This doctrine states that Congress alone is authorized to tax for general services which benefit the public rather than an individual applicant. In the National Cable case the Court stated that the FCC's fee to be valid had to be incident to a voluntary act and tied to a benefit conferred on an individual rather than the public.

As a result of that decision the FCC revised its fee structure which was subsequently invalidated on constitutional grounds in four separate opinions in the D.C. Circuit Court of Appeals in 1976 (National Cable Television Association v. FCC; Electronic Industries Association v. FCC; National Association of Broadcasters v. FCC; and Capital Cities Communications, Inc. v. FCC). The decisions were based on a three-part test for reviewing cost recovery constructed by the Court: (1) specification of service (or benefit, for which the agency is charging), (2) statement of cost basis (how indirect and direct costs, as well as public benefit costs, etc. are allocated), and (3) rate of return (to the government, reflecting services performed and value conferred to recipient). As MARC will point out, OSM's proposed regulations fail to meet these prescribed tests.

## II.

### Lack of Substantive Analysis

OSM has not conducted a thorough economic impact analysis of the proposed rules. In fact, OSM collected only four months of data on which to base its permit review cost estimates which excluded numerous cost elements proposed to be recovered. This lack of

information was validated through an industry Freedom of Information Act request which sought OSM's supporting data for the rulemaking. The response consisted of notes from a phone conversation between two OSM employees, a letter on funding cooperative agreements, and an undated memorandum on OSM's funding policy for cooperative agreements. It is quite clear that OSM's purposed analysis is totally inadequate. It is difficult if not impossible to determine the total fiscal impact of such a proposal without first determining associated costs. OSM provides no clear definition of its indirect costs, as well as direct and indirect costs of all other agencies expected to be involved in the cost recovery process. Nor does OSM accurately reflect or explain its estimates for permit preparation and processing and development of environmental impact statements especially from the perspective of cost to the industry in providing pertinent information to the regulatory authority.

Further, despite OSM's assertion that the regulation would not have an annual effect on the economy of \$100 million or more (thus triggering a regulatory impact analysis per Executive Order 12291), there is little doubt that significant benefits would be derived by analyzing a number of critical issues. First, whether and how much production will be shifted from federal lands as a result of an initial permit fee assessment on these lands and not private lands. Since resource holders and producers of federal coal already contribute to the federal government through rents, royalties and tax revenues, OSM must consider whether this added fee burden will cause a reduction in these revenues to the government. Second, what the impacts would be for OSM if a state dropped its cooperative agreement for mine regulation on federal lands to help prevent double charging of operators simply for OSM concurrence. Third, what ramifications are likely in the domestic and world coal market and vis-a-vis competing energy sources as a result of this added tax. Finally, OSM should demonstrate how its budget will be reduced to reflect the proposed fee system.

At this time there is no indication that OSM will propose budget cuts corresponding to the increased revenues, nor will there likely be a corresponding tax reduction to the general public or industry. Thus, since it is possible that increased fees will be reflected in the cost of energy to the consumer, the taxpayer may well pay twice for a service only received one time. This double dipping seems patently unfair and must be adequately analyzed.

There is no question that these issues, among others, must be studied by OSM to determine the cost impact of these proposals before it takes final action on them. Until OSM can provide specific information on the national and individual cost impacts, the proposed rulemaking should be placed in abeyance.

Finally, from a pure procedural perspective, publication of the proposed rule was premature. OSM is currently drafting revised regulations governing Federal Lands to comport with Judge Flannery's July, 1985 decision in In Re: Permanent Surface Mining Regulation Litigation (II). The draft rules have not been published for review and comment. The permit fee rules under current consideration will be applied to existing and future mine operations on Federal lands and the question of jurisdiction over such lands will be directly impacted by the unpublished proposal. Thus, until the industry and OSM have had an adequate opportunity to study the proposals in tandem, OSM should suspend any consideration of the proposed permit fee rules.

## III.

Concerns with the Proposed Administration of the Fee Recovery Program

The industry is extremely concerned that OSM's proposal virtually eliminates any incentive for the agency to conduct its permit review activities in an efficient and cost-effective manner. This is directly opposite the general effort to incorporate fiscal accountability and cost efficiencies in Federal programs. An open-ended accounting system encourages excessive government spending and potential over-regulation. It also greatly increases the penalties to which operators are subject due to the excessive and costly permit reviews resulting from constantly changing regulatory and legal environments as well as Administrative and organizational changes within OSM. One of MARC's member companies, for example, has had five permit project engineers in less than three years. The amount of time and money spent by the operator to train and retrain these OSM employees should realistically be recoverable from OSM, certainly not vice-versa. In fact, if a fee system is instituted, OSM should rightfully consider crediting an applicant's costs against any OSM fee.

Fixed v.  
Actual-Cost  
Fee

Should a fee be imposed, especially on an open-ended basis, it will likely provide a disincentive for applicants to provide extensive data during permit review since the more information provided to the reviewer, the larger the cost to the applicant will be. Many operators may provide the minimum acceptable amount of data. This is certainly not beneficial to the whole regulatory process. MARC believes the Congress took this into consideration when it authorized (not mandated) a fixed cost, front-end fee as evidenced by the statutory language of 507(a) which states that such a fee shall accompany the permit application. Although OSM has not provided sufficient documentation regarding its cost estimates to allow MARC to substantially analyze the merits of a fixed fee versus actual cost system, if a cost recovery plan was imposed, it appears that a flat fee would reduce a number of potential problems.

One of those problems is presented by OSM's poor track record for collecting other fees. Additional questions which must be considered if an actual cost system is selected include whether OSM has established a system to account for actual costs; who will determine indirect cost rates, overhead, other costs potentially included; and has an automated billing system been set up?

The benefits of a fixed fee system are first, that it would enable applicants to account for the additional costs in corporate budget planning; second, it would not impair an operator's ability to reliably analyze his costs in the development of contractual bids; third, it would keep OSM's administrative and overhead costs down since a less elaborate accounting system would be necessary; and finally and most importantly, it would provide a definite incentive for OSM to be efficient since it would not be able to recover unlimited expenses associated with unnecessarily protracted permit reviews. For example a fixed fee schedule might be established by setting several levels where an operator's obligation is based on his production rate, and would cover a five-year permit as well as possible revisions and modifications. Another method might be to establish a fixed filing fee to be accompanied by a fixed acreage fee.

Other  
Permit-  
Related  
Costs

Although OSM indicated its preference for charging operators for actual costs incurred, it did a woefully inadequate job considering how it would account for a variety of costs associated with the permit application process. For example, SMCRA calls for public participation throughout each aspect of the mining and reclamation operation, yet the rule does not address whether or how OSM would recover costs of its personnel reviewing public comments submitted during the permit application process. MARC believes, consistent with Congress' intent that SMCRA benefits the general public, operator/applicants should not be charged for this review. Similarly, other costs such as those expended on defensive litigation for permit-related issues should not be recovered from an applicant, since there would be little incentive on OSM's part to settle expeditiously knowing that the operator would ultimately be charged for the agency's expenses.

Further, the cost of supplemental environmental studies, such as those which may be required as a result of an unsuitability petition, should only be recoverable if requested by the operator/applicant. In fact, OSM should equitably charge citizens who submit unsuitability petitions for OSM's review, especially since the process is often extensive. Essentially, OSM should not selectively apply its cost recovery principles to operators only, nor should the agency charge an operator for

expenses over which he has no control. Finally, OSM has not defined how costs for cumulative hydrologic assessments, which extend beyond permit boundaries and thus benefit other operators will be assessed. Nor has it determined who will be charged for alluvial valley floor pre-determinations. Each of these circumstances must be carefully considered by OSM to ensure that any fees imposed are established equitably, and will not result in a reduction in the effectiveness and intent of the law.

An item or activity OSM did consider in its cost recovery proposal included the preparation of an environmental impact statement (EIS). MARC is concerned that OSM currently lacks substantive guidelines for determining when an EIS needs to be prepared, and any assessment of whether to complete one based on a variety of factors including fiscal reasonableness will be dismissed in favor of conducting more studies at the operator's expense if the proposal is approved. Coal companies must be assured, by having the ability to review sound decisionmaking criteria, that this will not be the case.

Inspection  
and  
Enforce-  
ment Costs

OSM has indicated its preference not to charge for inspection and enforcement related costs. MARC agrees that these costs should be excluded not only because the public is the primary beneficiary of such activities but, to use OSM's logic, because it is not a service being requested by an operator. In the extreme, perhaps OSM could argue that if a violation was cited then an operator derives the benefit of being forced to adhere to SMCRA's standards. Conversely however, if no violation was written then the operator derived no benefit since he was already in compliance, hence no fee should be charged. These circumstances would only create an incentive for OSM to write violations and would obviously be an unreasonable approach. Other complications would have to be considered, such as who would absorb the cost of an inspection as a result of a citizen request, and how would OSM account for having more than one inspector on site, as is frequently the case now. In fact, one of MARC's Western operators attested to the fact that at one joint federal-state inspection there were 15 inspectors on site.

The same case OSM drew its justification from, the Mississippi Power and Light v. U.S. NRC (5th Cir. 1979) decision cites a quote from the Bureau of the Budget Circular A-25 regarding a special benefit for which a charge should be imposed:



...when a Government-rendered service...is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group...(e.g.,...an inspection after regular duty hours)."

Thus, it is clear that inspections during regular working hours should not be considered a special benefit to the operator and should not be charged to him.

#### Mid-term Reviews

MARC believes that statutorily mandated mid-term permit reviews should not be charged to coal operators. On its face, charging for these reviews is unreasonable due to the continuous excessive staff turnover within OSM throughout the country. The circumstances make it extremely difficult to maintain any kind of continuity over the five-year permit term, which in turn substantially increases the costs over which operators have no control. Additionally, the rationale presented by OSM is at best a poorly twisted interpretation of SMCRA's 507(a), as evidenced by OSM's preamble to the proposed rule. Initially, OSM quotes the statute: "The regulatory authority may develop procedures so as to enable the cost of the fee to be paid over the term of the permit" to justify charging for services rendered for activities other than the permit application processing itself. However, OSM then, only several pages later, uses the exact same language to justify providing for installment payments. A plain reading of the statute shows that Section 507(a) refers to the use of an installment payment plan, not to OSM's ability to recapture costs over the life of the permit. Thus, operators should not be charged for mid-term permit reviews.

#### Mine Plan Reviews

OSM proposes to collect fees for its work involved in processing mine plans pursuant to the Mineral Lands Leasing Act of 1920 (MLLA). MARC believes this is a premature proposal since many issues dealing with mine plan review are currently subject to review in the D.C. Circuit Court of Appeals. Further, OSM has indicated its intent to rewrite the regulations which were overturned by Judge Flannery in his District Court opinion.

Further, mine plan processing is an MLLA function rather than a SMCRA-based requirement; thus, OSM should look to the MLLA for its authority to assess fees, not SMCRA. MARC does not believe that such authority exists under the MLLA.

Cooperative Agreement States OSM is proposing to charge for its concurrence on permit decisions in cooperative agreement states. Although OSM must review all federal land mine permits, it is not obligated to issue them, thus distinguishing it from the Mississippi Power v. NRC case cited by OSM for support. Therefore, OSM isn't justified in charging a federal fee. Moreover however, if OSM were to charge a fee, such double assessments in cooperative agreement states would clearly create a competitive disadvantage for those states, which may well result in lost royalties and tax revenues if operators leave the state.

OSM Enforcement of State Programs MARC concurs with OSM that it is reasonable for the agency to assess permit fees where it is the regulatory authority enforcing a state program, this is equivalent to the states recovering costs to administer their regulatory programs. The OSM fees, of course, must not be so high that they discourage coal production in those states. However, in states where OSM is enforcing a state program (i.e., Oklahoma), OSM should not, as it is currently proposing, bill an applicant where the state has performed the same activity or service. OSM's justification that its record keeping would make it too difficult to separate which agency had done what is absurd. Clearly if OSM's accounting system isn't up to par to handle this, the entire proposal should be considered arbitrary and capricious.

Other Agency's Costs OSM has suggested that operators may be required to pay for work conducted by other agencies within the Department of Interior associated with their application. OSM did not directly state whether these agencies currently bill OSM for the costs of their respective reviews. In fact, it is unclear whether these agencies even have accounting systems in place to identify their direct and indirect costs associated with SMCRA reviews. It is not unreasonable to assume they may not, since even OSM just began to establish its system four months prior to publication of its proposal. Thus, it appears again that this rulemaking is premature and should be withdrawn until such questions are resolved.

Fee Disputes The problems discussed above are further compounded by the fact that OSM proposes not to accept the burden of proof when its clients (operator/applicants) challenge the agency for failure to make a timely decision or failure to be cost-efficient. This is blatantly unacceptable and inconsistent with established business practices. Without OSM accepting the burden of proof there are no checks or balances in the proposed system. There must be a defined procedure for considering factors such as efficiency and comparability between services requiring similar efforts to ensure adequate accountability. At a minimum, OSM must provide well-documented and verifiable

invoices, including supporting logs and records to the petitioner for review. OSM may want to consider establishing a non-partisan review board to review OSM charges annually and to provide decisions on fee disputes. Ultimately, OSM must properly accept the burden of proof and provide a mechanism for applicants to recover costs or deny payment to OSM when a dispute is settled.

Billing  
Of Fee

In its discussion of billing the fee, OSM provides no explanation on why it would consider billing a recipient of its services for work completed at any point in the review process, rather than postponing billing until a final decision is made. This is extremely inequitable since OSM proposes to be authorized to withhold the decision until after payment is made thus, providing the agency with no incentive to do a timely job of fully processing an application. There is a significant possibility that by the time OSM bills an operator and the company pays the bill, many months may pass since a decision was or could have been rendered. Rather than withholding a decision, OSM should consider issuing a conditional decision, with a final decision contingent on timely payment.

An additional problem for the applicant is created by having no idea what his time frame is for expecting a bill from OSM. Unless a specific phased billing approach is established in advance of work conducted with known billing cycles, OSM should not be authorized to pursue payment at its pleasure.

Additionally it is only reasonable to expect that if OSM is going to hold an applicant's money in advance of work completed (\$500 advanced payment), and subsequently determines that a refund is in order, an applicant should be reimbursed that amount with interest, since the government had in effect borrowed it from the operator.

Install-  
ment  
Payments

OSM proposed to allow certain qualified operators to pay in installments spread over the five-year permit term. As MARC previously stated, SMCRA clearly authorizes the use of installment payments and does not set limitations on qualifications concerning the nature of an operation or operator which should be eligible. OSM's proposed criteria that the actual balance due exceeds 4 percent of the capital needed to open the mine, or the coal reserves for the proposed mine are less than one million tons, may virtually eliminate most Western operators from eligibility. MARC believes that any applicant who is credit-worthy should be able to use an installment plan, particularly in light of the uncertainty of the amount to be due and the economics in the coal market nationally.

Small  
Operator  
Assistance

OSM indicates it will not waive or refund any part of the fee, except to qualified small operators, regardless of mitigating circumstances. This seemingly excludes any possibility raised by OSM for consideration of undue hardship cases. This would be a reasonable provision, since despite OSM's attempt to provide assistance to "small operators," it will likely provide relief to only a very small segment of the industry. Unless OSM can tie the provision to some definition other than the 100,000 ton requirement established for SOAP, there will be few producers helped by this clause since it may not be economically viable for these small producers to remain in business under current regulatory requirements. The failure of the SOAP program is partly the result of the arbitrarily low production ceiling of 100,000 tons established by Congress in 1977.

This trend is clearly borne out by recent industry statistics compiled from DOE's Energy Information Administration. During the period between 1977 and 1983 small surface mine operators producing up to 200,000 short tons annually suffered startling losses in nationwide production share with corresponding large decreases in number of mines. The overall production share decline of 35 percent is even more alarming considering that coal production nationwide increased 13 percent over the same period. Companies producing 200,000 - 500,000 tons suffered a nearly 9 percent loss of market share, while large mines producing over 500,000 tons gained over 45 percent of the overall share of production.

Small producers are the force which maintains a competitive market. The current and proposed costs associated with the surface mining regulatory program have increased the economies of scale necessary to operate in the coal industry and will continue to extract a heavy toll on producers mining under 500,000 tons annually. Therefore, OSM should re-examine its proposed exclusions and if it intends to realistically provide relief to those companies most affected by the proposed fees, it should consider revising its eligibility limit to at least 500,000 tons per year.

Experi-  
mental  
Practices

One type of application OSM neglected to discuss for which it is mandated to provide its services is an experimental practice permit application. Even in states with primacy, OSM is statutorily mandated to provide final approval of an experimental practice permit. This program is still in its fledgling state, primarily because operators willing to try innovative technologies to advance the state-of-the-art have been discouraged by the permit process and its associated delays. If OSM plans to propose in a future rulemaking to specifically

charge for these services, it will surely provide a significant enough disincentive to permanently disable the program. This would be a great disservice not only to the industry, but more importantly, to the general public who stands to benefit from these activities in the long run.

Retroactive Application OSM cannot, as it has contemplated, make the rule retroactive without strong evidence that it would not be blatantly arbitrary and capricious to do so. Not only would operator/applicants have been improperly notified of a pending fee, but by its own admission, OSM did not have a detailed accounting system to monitor such costs to be charged. In fact, OSM was unable to provide any cost estimates for activities conducted outside the technical centers.

#### IV. MARC's Concerns with Cost Recovery Through Elimination of State Program and Cooperative Agreement Grants

Although OSM's current proposal does not address the recovery of additional costs through elimination of state program and cooperative agreement grants, such a recommendation has recently been advanced by the General Accounting Office in its final report on OSM cost recovery.

GAO, not unlike OSM, did only a cursory economic impact evaluation resulting in the conclusion that operators could reasonably afford to absorb the full cost of the regulatory program by shifting all of the costs to the state level. MARC disputes this conclusion on a number of levels.

Insufficient Data The data base GAO relied upon is clearly insufficient to make such broad sweeping conclusions. GAO, by its own admission, did not take into account the effect of cost recovery and production cost increases on representative companies or segments of the industry. Due to the expense and difficulty in sampling a large number of coal company records, GAO reported, it based its analyses on interviews with coal companies, associations and state regulatory authorities. However, GAO spoke only with seven coal companies out of an estimated 3200 total nationwide population, and a proportionately small number of state regulatory authorities from which it based its findings that any fee increases from cost recovery would not be significant. Furthermore, while GAO observed that state legislators through the budget process, would play a key role in establishing local cost recovery programs, it neglected to try to interview this important group to determine the feasibility of program implementation. It seems clear from several of the comments GAO received from the governors of various coal states that the

governors believe a regulatory program that gives the federal government control over policy while giving the states responsibility for all program costs would be unworkable and unacceptable.

Other state commenters asserted with good reason, that it is the cost of doing business with the federal OSM that makes a state program so expensive. State spokesmen believe that OSM should continue to support costs for reports, reviews, meetings, etc. which the state must incur to work with OSM in its oversight role. Thus, unless these costs are supported, it would be cheaper for operators to work only with OSM, since they would not have to pay for these oversight costs.

State  
Primacy

In fact, several state regulatory authorities speculated that they would turn their programs over to OSM, rather than continue with primacy at a cost-prohibitive level. MARC believes that this would clearly contravene one of the basic tenets of the Surface Mining Act. Although GAO acknowledges that one of the key provisions of SMCRA is state primacy, it essentially sloughs it off by saying that there is a back-up mechanism, that of federal enforcement, if states give up their regulatory authority. GAO does not attempt to address whether an OSM-run program would be the same, better, or worse than numerous state programs, especially considering variations in state programs. However, this is a reality which should have been studied, especially due to the recent concern with OSM's overall capabilities, much less the ability to act as the primary regulatory authority in numerous states at one time.

Flawed  
Impact  
Analysis

Second, what impact analysis GAO did perform appears flawed. GAO stated that numerous companies' abilities to pass through their increased permit fees in their contracts would minimize any substantial impacts. This is not true. There are many producers, especially under current market conditions, selling coal on a spot basis. These costs cannot be passed on and, as a consequence, operators will be directly impacted. Even for companies with long-term contracts with pass-through provisions, negotiations will be affected by cost increases, reflected in lesser amounts of coal purchased under the contracts.

GAO's sensitivity analysis predicts a 1.5 million ton loss of coal in Pennsylvania by 1990. It dismisses this as an apparently insignificant issue. Unfortunately, this is not the case. Through discussions and materials provided by several MARC



members in Pennsylvania, it is clear that the lost tonnage impact was substantially understated by GAO. According to the Keystone Bituminous Coal Operators Assn. in 1984, one million tons of coal lost in Pennsylvania equates to a loss of:

300 coal jobs, 285 supply and service jobs, \$10 million in salaries, \$33 million in sales, \$2 million to the state in sales taxes, plus substantial reductions in capital stock tax, corporate income tax, etc.

Statutory  
Concerns

GAO seemingly ignores several statutory mandates aside from the most basic one that the states would assume primary responsibility for coal mine regulation. A provision Congress considered essential to SMCRA was that competition in interstate commerce among sellers of coal produced in different states would be minimized by setting nationwide standards for coal operations. If full cost recovery through permit fees is adopted, state regulatory authority's attitudes, capabilities and budgets become critical factors in assessing interstate competitiveness. Each of these elements will likely lead to a further exaggeration of the competitiveness of permit review that is already widely divergent between states.

Special  
Tax

GAO suggest a special tax be instituted to allow OSM to recover its costs of regulatory oversight and technical assistance (support costs). GAO acknowledges that Congress "apparently did not contemplate that these costs be borne by coal mine operators." However, the report states that GAO believes that Congress should consider implementing such a provision. GAO asserts that since OSM now collects abandoned mine land taxes, it has the administrative capability to collect additional taxes. GAO did not, however, consider what the added burden would be on the program on the industry.

Enforcement  
Fees

One area MARC must praise GAO for similarly relates to the recovery of other permit-related costs. Initially, GAO had suggested OSM recoup its costs for administrative and judicial proceedings arising from enforcement actions. Recovery of these costs indeed would have had a chilling effect on operators challenging a violation notice or penalty amount in good faith. As GAO discovered, and reflected in its report, there is no precedent for cost recovery for these actions except where suits were initiated in bad faith.

MARC believes the establishment of a full cost recovery system will likely encourage a burgeoning bureaucracy, on the state and federal level. Moving away from the Congressional budget process removes any pressure on OSM or the state regulatory authorities to be diligent in processing permit applications. Such an approach is dangerous and a prescription for a totally open-ended regulatory process which is clearly inconsistent with sound management policies. If such a program were adopted, there must be a discernable and substantial effort on the part of OSM and the states to reduce excesses built into the program before transferring the cost to the industry.

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Senator WARNER. Thank you very much, Mr. Gerkin.  
Mr. Young—points in your testimony that we've not covered.

**STATEMENT OF STEVEN G. YOUNG, VICE PRESIDENT, CONSOLIDATION COAL CO., ON BEHALF OF THE JOINT NCA/AMC COMMITTEE ON SURFACE MINING REGULATION**

Mr. YOUNG. Mr. Chairman, I'll try and be brief. I'm vice president, government affairs, Consolidation Coal Co. I'm appearing today in behalf of the joint NCA/AMC Committee on Surface Mining. We represent the overwhelming majority of coal producers in the United States, principally the larger operators, and I should say the larger operators are opposed, vehemently, to this proposal.

I'd like to say that we are very gratified that the subcommittee has taken a keen interest in the competitive problems of the coal industry. And we hope that your committee might be able to play a role in spragging this Machiavellian proposal.

I'd like to say we concur with the other operators in their testimony. We'd like to submit for the record, in addition to my formal statement, the objections we've made to the GAO proposals and the OSM proposed permit.

Senator WARNER. Without objection.

Mr. YOUNG. Thank you.

We've identified a number of distinct issues in the GAO and the OSM proposals that have not been adequately addressed. An economic analysis has not been performed. Until this is done, these issues are unresolved and these regulations should not go forward, nor should GAO's proposal go forward.

I should note that the Office of Surface Mining is relying heavily upon the Independent Offices Appropriations Act, as interpreted by the Bureau of Budget Circular A-25, in giving it authority to go after these services. Governor Herschler made the point very effectively that the act, the act does not call for benefit to the industry, but for benefit to the general public. And my written statement will get into the Circular A-25.

I'd only like to read one of the quotes from there. "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefiting broadly the general public. For example, licensing of a new biological product."

And the cases that OSM cites in substantiation for going ahead in this regard deal with highly regulated quasi-public service industries, such as public utilities, granting them nuclear reactor permits and things of this nature. There is no parallel, there's no precedent for independent competitive industry like the coal industry to be saddled with this. The Nuclear Regulatory Commission and FERC are the agencies that have such charges right now.

Senator WARNER. You've put your finger on a very important point there, the legislative history.

Mr. YOUNG. We have, sir, we've bought the right to mine the coal. What were getting from the Office of Surface Mining is no license. It merely imposes conditions upon us under the permits as to how we're going to protect the public. And so we don't feel we

ought to be paying for that privilege. We have the privilege to mine.

It's a tortured construction to find that the Office of Surface Mining gives us any services besides that which benefit the general public. I'd like to say that the joint committee has initiated a Freedom of Information Act request of the Office of Surface Mining to find what substantiation they had for the regulations, and we find an appalling lack of substance underriding the reason to change these regulations.

The overall implications and full comprehensive implementation of this precedent-setting policy will be enormous, affecting economics, markets, environmental impact, and so forth.

I'd like to point out the GAO's statement that you could add an additional \$5 on the price is absolutely ludicrous. Mr. Chairman, there are a number of great coal companies in this country right now that are awash and foundering in red ink, and these are companies producing millions of tons of coal, and this foundering is occasioned only by a few cents per ton. For example, a penny on our company means a half a million dollars.

Senator WARNER. Senator Ford made that point very clearly.

Mr. YOUNG. Well, I think Senator Ford and Senator Rockefeller, both being former Governors, would not take lightly to the statement that well, maybe a million and a half tons would go from Pennsylvania; they'd lose it. I mean a million and a half tons from the State of West Virginia or the State of Kentucky is substantial, and that's based upon the supposition that GAO's figures are correct—which I think I'll point out, they are not correct, or Office of Surface Mining.

We believe from extensive experience and some recent studies, that the actual permit review costs for western permits approximate more than \$200,000 a permit, versus OSM's average cost estimate of \$60,000. We estimate a review of the eastern permit would be in the nature of \$30,000 to \$50,000, versus OSM's estimate of \$6,000 to \$29,000.

These numbers do not take into account any estimation for the cost of general overhead, inspection, enforcement, or midterm permit reviewing, all of which are consideration, OSM has said. OSM estimates western EIS review would cost \$38,000 to \$90,000. Poppycock. Our professionals say EIS would cost perhaps exceeding \$275,000, at least 300 percent more. The western numbers are staggering. EIS preparation, \$250,000 to \$300,000. EIS review, \$275,000-plus. Permit review, \$200,000-plus.

OSM proposes a special break for small operators which produce less than 100,000 tons. Believe me, small operators produce a lot more than 100,000 tons—the ones you want to protect. The ones producing less than 100,000 tons that are still in business, they'll have their protection, but there's a great number of us operators, not Consolidation Coal Co.—we're going to be a survivor under this thing—we'll still be around. And some of the other large coal companies will be survivors, but there's a great number of coal companies producing more than 100,000 but less than 2 or 3 million tons a year that are going to be severely hurt.

Senator WARNER. I agree. I agree with your point.

Mr. YOUNG. And if you exempt them, there's no revenues for the Government. In fact, the total revenue here we're talking about is a savings of maybe \$60 million at the outset, even including the tax that they're imposing, that you change the law to impose on us, and \$60 million is not the way you deal with the Federal deficit.

GAO naively assumes that the coal operators will simply pass on the cost of increased cost recovery fees to their customers. This is an unsupported generalization that has not been subjected to any analysis. Some operators do and some don't pass on costs. We think, on the whole, this type of cost won't be passed along because it's not a tax.

The coal industry is in the process of going through increasing costs as a result of SMCRA, the reclamation fees, increased transportation costs, State taxes, and now the administration has proposed an additional 50-percent increase on the black lung franchise tax.

The precedent established by GAO's and OSM's proposal, as noted by Senator Rockefeller, is awesome in its projection to other Government services. Up to now, the general public has always said thank God we don't get all the Government we're paying for, and now you're saying that the coal industry is going to pay for this and have to thank them for it.

It's the worst kind of national policy to burden the U.S. coal industry with additional cost and fees. Foreign producers working closely with their governments must be having a real chortle at our expense. How can the United States be serious about a balance-of-trade deficit as we invite foreign coal producers to ship coal to Newcastle, USA, so to speak, and see our ability to compete in the foreign marketplace further handicapped.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Young follows:]



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Testimony of

Stephen G. Young

Vice President, Government Affairs

Consolidation Coal Company

 on behalf of

The National Coal Association/American Mining Congress  
Joint Committee on Surface Mining Regulations

before the

  
Subcommittee on Natural Resources  
Development and Production  
of the  
Senate Energy and Natural Resources Committee

July 9, 1985



Good morning. My name is Stephen G. Young and I am Vice President-Government Affairs with Consolidation Coal Company headquartered in Pittsburgh, Pennsylvania. My company is a subsidiary of Conoco, Inc.

My testimony this morning is presented on behalf of the National Coal Association/American Mining Congress Joint Committee on Surface Mining Regulations, which is responsible for monitoring and responding to all legislative and regulatory matters concerning surface coal mining and reclamation.

The National Coal Association and the American Mining Congress are trade associations that represent the major coal producers in the United States. We appreciate the opportunity to testify before your subcommittee this morning on the topic of permit fees.

As you know, the issue of increased permit fees has risen in two contexts: a report by the General Accounting Office (GAO) entitled "The Department of the Interior's Office of Surface Mining Should More Fully Recover or Eliminate Its Costs of Regulating Coal Mining", and a recently proposed rule by the Office of Surface Mining (OSM) concerning the assessment of permit fees (50 FR 7522, February 22, 1985). The Joint Committee has been an active participant in both of these efforts having submitted comments on the draft GAO report and on the proposed rule. We strongly object to these proposals. We would request permission to submit copies of our comments for the record.

There are a number of distinct issues in both the GAO report and the OSM proposal upon which we have commented and that we wish to discuss today. These issues go to the heart of the cost recovery/permit fees issue and have not, in our view, received the requisite attention and analysis they deserve. Without more, the existence of these unresolved issues should preclude efforts by OSM to implement the GAO recommendations or finalize the permit fees rules.

We should mention at the outset that GAO attempted to address some of our comments in its final report. However, the cavalier fashion in which GAO dismissed our concerns has done little to alleviate those concerns. In fact, GAO's elliptical manner in handling our concerns is symptomatic, in our view, of its alleged analysis of many of the major issues presented in the report. Again, without more, GAO's findings and recommendations should be viewed as speculative hyperbole that begs for much needed justification in terms of data and in-depth analysis.

GAO's report also demonstrates a lack of familiarity with the practical realities of full cost recovery. In this regard, we continue to maintain our position that a survey of only a handful of coal companies -- the affected party in this case -- is far from sufficient to provide GAO with an adequate base of experience with which to project the impacts from such a far-reaching proposal as full cost recovery.

GAO's excuse that it was only able to locate seven companies willing to cooperate with them is hardly acceptable.

It is incumbent upon any agency -- especially GAO -- to undertake the necessary investigation to fully and effectively evaluate the impact of a proposal. Otherwise, authoritarian statements and conclusions about the nature and extent of impacts resulting from the proposal appear without merit and are easily dismissed as baseless conjecture.

We firmly believe that a comprehensive economic analysis of the full cost recovery proposal as envisioned by GAO will in fact demonstrate its debilitating affects on the coal industry. This is especially true if GAO were to take the proposal to its logical conclusion: that is, full cost recovery by all federal agencies that regulate the coal industry. Adding the impacts of full cost recovery programs by agencies such as MSHA, BLM, EPA, OSHA, MMS, and the U.S. Corps of Engineers -- all of which perform "special services for the benefit of the industry" under GAO's analysis -- would reveal the true impact of the proposal. Although this scenario may be painted as an overreaction by some, we assert that it is a very real possibility and is, in fact, the intended course envisioned by GAO. The actual result, from our perspective, would be unpredictably disruptive to an already beleaguered industry. Those who could least afford it would undoubtedly be hit the hardest.

We would like now to address some of the specific issues raised by the GAO report and the OSM proposal.

#### Primary Beneficiary

The legislative history of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) clearly indicates the primary beneficiary of the regulatory program to be the general public. GAO and OSM appear to ignore the intent of Congress regarding this issue. While both agencies fail to discuss who the primary beneficiary is, there is an underlying assumption that the primary beneficiary is industry and consequently industry should pay all the costs for certain regulatory functions.

Section 102(a) of SMCRA states: "Section 102. It is the purpose of this Act to (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."

Circular A-25 of the Bureau of the Budget, which OSM has used to justify the imposition of fees, states: "the provisions of this Circular cover all Federal activities that convey special benefits to recipients above and beyond those accruing to the public at large."

Regardless of GAO's and OSM's contention that approval of a permit application or mining plan "confers on an operator a specific benefit", the primary beneficiary, if not the sole beneficiary, is the general public. The general public benefits by a thorough review of an operator's mining, reclamation and environmental control plans to insure that the health, safety and welfare of the public will be protected both during and after mining activities. At present, this review is paid for by

departmental funds derived from general tax revenues (obtained from the general populace as well as industry).

While on the subject of the "benefits" that are provided by the government to industry, we would note that there are very substantial benefits provided by the industry not only to the government but to the general public as well in the course of permit review and approval. In fact, the permit approval process undertaken by the government is significantly less in terms of cost, time and effort when compared to the myriad of environmental baseline studies, monitoring efforts, legal analyses, and extensive testing that attend industry's preparation of the permit application itself, mining plans and EISs. These efforts are of direct benefit to the general public and yet little regard is paid to them.

#### What Constitutes a "Service"

Section 9701 of the IOAA authorizes an agency to prescribe regulations establishing the charge for a service provided by the agency. Bureau of the Budget Circular No. A-25 of September 23, 1959, interprets that a special service exists when the agency's action:

- (a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g. receiving a patent, crop insurance, or a license to carry on specific business); or

- (b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g. certificates of necessity and convenience for airline routes, or safety inspections of craft);
- (c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)." [Emphasis added]

Furthermore the circular goes on to read:

No charge should be made for services when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public (e.g., licensing of a new biological product)."

In our view this description of a "service" clearly excludes the permit issuance circumstance. This is especially true given the absence of an "immediate or substantial gain or value" to the permittee above and beyond that accruing to the general public.

GAO and OSM cite a number of court cases as justification for their fee proposal. However, the cases cited dealing with the question of appropriateness of fees are for the most part



cases where specific licenses or privileges were involved (e.g. privilege to operate cable television systems, license to operate a nuclear reactor).

In the case of surface coal mining, the right to mine exists by reason of ownership of the mining rights. No license or privilege is required to confer the mining rights. SMCRA does require a permit but that permit does not confer the mining rights or privileges in the sense of a license such as the licenses involved in many of the decided cases. Rather, the SMCRA permit is essentially a collection of conditions imposed upon the pre-existing right to mine. These conditions are imposed not for the protection of the interests of the coal mine operator or as conditions on the grant of a privilege that, except for the grant, would not exist, but rather they are imposed for the protection of the environment, which is clearly a public and not a private purpose.

Thus, it is difficult to see how the regulatory activities of OSM can be read to confer a "benefit" or thing of value (see National Cable Television Association vs. United States) on the coal mine operator independent of the benefit to the public at large. The coal mine operator is a beneficiary of OSM's regulatory activities only insofar as the coal mine operator is just another member of the public--clearly not a legally sufficient reason to impose on the operator the costs of OSM's regulatory activities. As has been repeatedly held, no charge for "services" should be made "when the identification of the ultimate beneficiary is obscure and the services can be

primarily considered as benefitting broadly the general public." (National Cable Television vs. United States; OMB Circular).

In the decided cases "services" can be more readily discerned (e.g. franchise to broadcasting companies and assured freedom to operate without interference from others--e.g. limited competition (National Cable Television Association vs. F.C.C.), limitation on liability under the Price-Anderson Act available to NRC licensees (Mississippi Power & Light vs. N.R.C.)).

#### Inadequate Regulatory Impact Analysis

It appears that the proposal and the administration's policy is that recovery of costs will be proposed wherever non-public beneficiaries can be identified.

The overall implications of this precedent-setting policy will be enormous, affecting economics, markets, environmental impact, etc. Therefore, we urge OSM and GAO to perform a more extensive regulatory impact analysis on the policy as a whole.

With regard to OSM's cost analysis, on April 17 the Joint Committee requested certain information from OSM by way of the Freedom of Information Act (FOIA) regarding OSM's basis for the figures and data cited in the preamble to the proposed rule. We received OSM's response to our request on May 20. OSM's response consists of a cryptic notation of a phone conversation, a general letter on funding cooperative agreements and an undated memorandum on OSM's funding policy for cooperative agreements. This information makes it abundantly clear that in fact OSM's

support for the rule is totally inadequate and insufficient. Much of the "supporting data" supplied to us in OSM's response raises its own questions of support, adequacy and reliability -- especially OSM's calculations of man days required to perform certain tasks in the permit review process.

Typical costs for processing permit applications are cited by OSM. The source of this data is unknown because OSM, by its own admission, first instituted the cost accounting procedures necessary for determining the actual cost of providing a service on October 1, 1984. Other costs are based on experience with programs such as those in Oklahoma and Tennessee--neither of which are considered to be typical of the majority of coal producing states given their different topography and geology. Like the economic impact analysis done by GAO, OSM's analysis of the economic impact on the industry is both cryptic and superficial. We urge OSM to re-examine the projected costs to various segments of the industry and the impacts of these proposals upon the competitive position of those segments.

In particular, the additional costs that a mining operation will incur because of the presence of Federal land need to be assessed. While it is suggested that some steps might be duplicated and therefore result in higher cumulative fees, OSM has failed to fully describe this duplication or the possible costs associated with it. Nor has OSM justified why a permittee must pay for OSM's oversight and review of cooperative program

permits where the Secretary has delegated the permitting responsibility to the State.

OSM has further failed to realistically assess the cost for preparation of an environmental impact statement. Several examples are known where the cost for preparation of an EIS has exceeded \$200,000 for a western mine. Also, OSM has failed to estimate the costs many applicants incur gathering and preparing information for an EIS. As with mining plans and permits, the EIS largely benefits the public. The applicant, therefore, should not have to pay all or even most of the EIS preparation costs. In addition, a methodology should be designed whereby an applicant's costs can be credited against any possible fee.

Consolidation Coal Company (Consol) has done its own analysis of permit costs based upon its extensive experience and some recent investigation. It found that actual permit review costs for Western permits approximate more than \$200,000 versus OSM's average cost estimate of \$60,000. Consol estimates that a review of an Eastern permit would be in the order of \$30,000-\$50,000 versus OSM's estimate of \$6,000 to \$29,000. These numbers do not take into account any costs for general overhead, inspection and enforcement, or mid-term permit review, all of which are under consideration by OSM.

OSM estimates that a Western EIS review would cost \$38,000 to \$90,000. Consol's professionals say the EIS cost would probably exceed \$275,000 -- at least 300% more. The Western numbers are staggering:

EIS Preparation - \$250,000 - \$300,000

EIS Review - \$275,000 plus

Permit Review - \$200,000 plus.

The glaring conclusion from our review of both the GAO report and OSM's preamble and supporting documentation is inescapable -- both agencies have done a woefully inadequate job of supporting their proposals with sound, credible and reliable data. In fact, the proposals are rife with inconclusive statements, unaccounted for costs, inconsistencies, inaccuracies and many unknowns. As we see it, OSM's and GAO's only course of action at this juncture is to step back and begin again with an eye toward better justification and documentation of their proposals.

#### Phasing Out Cooperative Agreement Grants

If the GAO recommendations that provide for the imposition of a federal surface mining permit fee and the phase-out of cooperative agreement grants were accepted, they would produce results that were never contemplated by the Congress. In states that have entered into cooperative agreements with the federal government, an operator under the GAO proposal would pay two permit fees: one to the state and one to the federal government. This double levy would make federal coal less competitive and decrease the fair market value of federal leases. Both of these results are contrary to the objectives of Congress and the Administration.

GAO, in its response to comments, states that even where OSM is the sole regulatory authority on federal lands, an operator would still pay two fees: one for review of the permit and another for review of the mining plan. Thus GAO concludes, there is no difference between the cooperative agreement situation and that where OSM is the sole regulatory authority when it comes to the fees an operator would be required to pay were cooperative agreement grants eliminated.

What GAO fails to recognize is the fact that where a cooperative agreement is in place, the fee assessed by OSM would include not only an assessment for review of the mining plan but an additional assessment for review of the permit application by OSM. This latter review, although unaccounted for by GAO, is inevitable under OSM's current interpretation of its responsibilities under the federal lands program rules.

The phase-out of cooperative agreement grants would eliminate an important incentive for a state to enter into a cooperative agreement. The state portion of the royalties, state tax revenues and increased local employment are all benefits a Western state derives from the development of federal coal within its borders. However, a double permit fee would cause an operator to pursue opportunities in another state where the double fee is not imposed (i.e. where there is no cooperative agreement) and the cooperative agreement state would not receive those benefits. Given the alternative of entering into a cooperative agreement or maximizing its economic benefits, a state would probably choose the latter.



### Special Coal Operators' Tax

The proposed tax to cover the costs of support activities in the areas of research oversight and promulgation of regulations once again ignores the fact that it is the public as a whole that receives any benefits that may be derived from such activities. The proposed tax would make the coal industry the benefactor of a bureaucracy that would have no reason to be fiscally responsible. The government would only need to increase the tax on coal producers to finance its needs as well as its whims.

To force the coal industry to fund the promulgation of regulations (apparently without regard for whether the process is initiated in good faith or whether the process produces regulations that can survive technical or legal review) has no comparable precedent. Any group that desires to harass the coal industry could simply file unreasonable petitions for rule changes under Section 201(g) of SMCRA.

### Passing on of Coal Industry Costs to its Customers

GAO naively assumes that all coal operators, as a matter of course, will simply pass on the costs of increased user fees to their customers. This is an unsupportable generalization and is glossed over with little, if any, analysis. Some operators do not have contracts with their customers that allow them to pass on such costs. Some operators do not have the type of customers that utilize such contracts or provide for the inclusion of "pass on" contract provisions. Finally, even where such "pass on" provisions exist, GAO could be fostering an administrative

nightmare in that such customers would require an audit of not only the coal company's books and charges, but those of the regulatory authority as well.

Furthermore, the coal industry is extremely competitive with other energy sources, so that even "pass through" clauses do not insure protection against adverse impacts. Fuel switching is quite common and in recent history the industry has been severely hurt by this. The industry is in the process of going through a period of increasing costs as a result of SMCRA, increased transportation costs and state taxes, and the Administration has proposed a 50% increase in the Black Lung Franchise Tax -- none of which is given much recognition in the GAO report. Cut backs on coal and switching to another fuel source results in increased production costs and those are not "pass through" costs. Fuel switching is relatively easy today with all major power grids interconnected and surplus power available. The simplistic assumption that the cost increases can be passed on without a critical economic analysis of the industry renders the report so seriously flawed as to be without any merit. It is the worst kind of national policy to burden U.S. coal with additional costs and fees. Foreign producers, working closely with their governments must be having a real chortle at our expense over this proposal. How can the U.S. be serious about the balance of trade deficit as we invite foreign producers to ship coals to Newcastle, USA, so to speak and watch our ability to compete in the foreign marketplace further handicapped.

#### Conclusion

With regard to the OSM proposal, we believe it goes well beyond what is authorized by law. While SMCRA authorizes a fee, OSM has failed to separate the public versus the private benefits of its actions. The end result is a proposal that unreasonably places the financial burden on industry for an activity that largely benefits the public. Because it does not know, OSM goes on to gloss over the economic implications of its proposal and to severely restrict its own accountability. Finally, OSM failed to address the economic implications of imposing fees for an activity that in its nature demands considerable interaction between the applicant and the agency and where the final sum of the fees is unknown at the onset of the process. Under the circumstances, we have urged OSM to withdraw the rule and delay its reproposal until such time as the agency has more accurate and reliable data to support the rule and its impacts on the industry. To move ahead with the rule as presently proposed subjects it to challenge as arbitrary, capricious and inconsistent with law.

As for the GAO report, it is important to recognize the far-reaching effect it could conceivably have on the coal industry and our ability to compete. The issues presented are critical to us and, consequently, deserve a more indepth analysis and discussion than is presently contained the report.

Again, we appreciate the opportunity to present our views on this important issue. We also want to compliment you for scheduling a hearing to investigate the complexities and impacts of the issue. Our hope is that Congressional interest in the issue will preclude hasty, ill-conceived and unsupported ramifications from GOA's report. I would be happy to answer any questions you may have.



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May 31, 1985

Mr. Jed Christensen  
Acting Director  
Office of Surface Mining  
U.S. Department of the Interior  
1951 Constitution Avenue, N.W.  
Washington, D.C. 20240

Dear Mr. Christensen:

This letter represents the comments of the Joint National Coal Association/American Mining Congress Committee on Surface Mining Regulations regarding proposed rules published by the Office of Surface Mining (OSM) on February 22, 1985, at 50 FR 7522 concerning the assessment of permit fees. We appreciate the opportunity to comment on this important rulemaking.

The Joint Committee is comprised of over 180 industry experts representing the coal company members of both the American Mining Congress and the National Coal Association, as well as representatives from many of the state coal associations and other coal companies. Thus, the Joint Committee membership represents every type of coal mining operation, as well as every coal mining region, in the nation. Industry personnel on the Joint Committee are experts in their own right in the various disciplines that impact coal mining operations.

The rules proposed by OSM appear to be in response to Bureau of the Budget Circular A-25 and to the General Accounting Office's (GAO) draft report entitled: "The Interior Department's Office of Surface Mining Should More Fully Recover or Eliminate Costs to Regulating Coal Mining." Comments on the latter document were submitted to GAO on November 20, 1984, by the Joint Committee, a copy of which is attached. Since many of the concerns expressed at that time are still relevant, they will be repeated in these comments as appropriate.

Before delving into an analysis of the various issues attending the proposed rules, we have several general comments to make. First, with regard to OSM's cost analysis, on April 17 the Joint Committee requested certain information from OSM by way of the Freedom of Information Act (FOIA) regarding OSM's basis for the figures and data cited in the preamble to the proposed rule. We received OSM's response to our request on May 20. OSM's response consists of a cryptic notation of a phone conversation, a general letter on funding cooperative agreements and an undated memorandum on OSM's funding policy for cooperative agreements. This information makes it abundantly clear that in fact OSM's support for the rule is totally inadequate and insufficient. Much of the "supporting data" supplied to us in OSM's response raises its own questions of support, adequacy and reliability--especially OSM's calculations of man days required to perform certain tasks in the permit review process.

The glaring conclusion from our review of OSM's preamble and supporting documentation is inescapable--the agency has done a woefully inadequate job of supporting its rulemaking with sound, credible and reliable data. In fact, the proposal is rife with inconclusive statements, unaccounted for costs, inconsistencies, inaccuracies and many, many unknowns. As we see it, OSM's only course of action at this juncture is to step back and begin again with an eye toward better justification and documentation of its proposal.

Secondly, we wish to remind OSM of the far-reaching impacts of the proposal. Although the scope of this rulemaking is limited to only certain federal lands and programs, it will no doubt serve as the blueprint for a more comprehensive rule that will apply to all state and federal regulatory programs--and to all aspects of those programs as recommended by GAO. The impact on both coal operators and state regulatory authorities under such a scenario will be exacerbated. Although specific impacts are unknown (given OSM's sketchy analysis), initial estimates call for major disruptions of the current state regulatory program system and for greater economic burdens on an already beleaguered coal industry. As a result, we urge OSM to move cautiously in this proposed undertaking, being ever mindful of the precedent-setting ramifications of its actions.

Thirdly, OSM needs to be more sensitive to the economic impacts of its proposal on the coal industry. To date, the agency has given short shrift to the allegations of economic impact asserting that the proposal would not have either a major regulatory or economic impact. We seriously question OSM's conclusion and have urged the agency several times to take a closer look at their impact analysis. It is our position that the proposed rules could result in additional costs of up to \$3.00 a ton if implemented as we anticipate. In today's economic climate even a moderate increase of \$.30 a ton could make the difference between winning or losing a long-term coal contract. In addition, increased domestic coal prices will dramatically affect the position of the U. S. in the worldwide marketplace for coal.

There is little doubt that Congress ever intended to burden the coal industry with such a dramatic increase in the cost of doing business. In fact, Congress was well aware of the fact that coal mining is a very capital intensive industry and thus any significant increases in the cost of operation would result in severe economic ramifications and should therefore be avoided unless adequately justified. For OSM to advocate a change from limited application fees to full cost recovery is just the sort of economic circumstance Congress sought to avoid or at least to initiate only after considerable thought and study. We therefore request OSM, once again, to undertake a full scale, in-depth analysis of the economic and regulatory impact of its proposal.

Finally, as we assume OSM is aware, Senator John Warner (R-VA) has scheduled an oversight hearing concerning the permit fees issue on July 9 before his Subcommittee on Natural Resources Development and Production. Given this development and the controversial nature of the rule, we believe it would be appropriate for OSM to either extend the comment period until after the hearing or, at a minimum, to plan on reopening the comment period for 15 days after the hearing to allow the submission of additional materials for the record. In any event, we trust OSM will repropose these regulations after the oversight hearing as we expect the agency will benefit greatly from the testimony received at the hearing.

There are several issues that we will discuss in our comments, as follows:

1. Lack of correct identification of the primary beneficiary of the regulatory program;
2. Confusion as to what constitutes a "service";
3. Determination of "reasonable" fees;
4. Accountability of costs;
5. Fees to be charged regardless of the outcome of the review and decision process;
6. Cooperative agreement and State grants;
7. Inadequate regulatory impact analysis;
8. Fixed vs. actual cost fees;
9. The primary beneficiary of inspection and enforcement efforts;
10. The timing of permit fee initiation;
11. Processing of mining plans pursuant to the MLLA;
12. Federal programs for states and enforcement of state programs;



13. Federal lands in states with cooperative agreements:

14. Small operator fee.

#### 1. Primary Beneficiary

The Legislative history of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) clearly indicates the primary beneficiary of the regulatory program to be the general public. OSM appears to ignore the intent of Congress regarding this issue. While the agency fails to discuss who the primary beneficiary is, there is an underlying assumption that the primary beneficiary is industry and consequently industry should pay all the costs for certain regulatory functions.

Section 102(a) of SMCRA states: "Section 102. It is the purpose of this Act to (a) establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations."

Circular A-25 of the Bureau of the Budget, which OSM has used to justify the imposition of fees, states: "the provisions of this Circular cover all Federal activities that convey special benefits to recipients above and beyond those accruing to the public at large." The special benefits to operators over and above those accruing to the general public will be of a very restricted nature. In our view they will be far exceeded by the benefits to the public from the collection of the abandoned mine land fees that are levied on each ton of coal produced and that are used to reclaim abandoned sites. Here the beneficiary is clearly the public, at the present coal operator's expense.

Regardless of OSM's contention that approval of a permit application or mining plan "confers on an operator a specific benefit", the primary beneficiary, if not the sole beneficiary, is the general public. The general public benefits by a thorough review of an operator's mining, reclamation and environmental control plans to insure that the health, safety and welfare of the public will be protected both during and after mining activities. At present, this review is paid for by departmental funds derived from general tax revenues (obtained from the general populace as well as industry).

Two additional comments are appropriate here. First, it appears that the governmental service being provided is already being paid for by the interests served (i.e. general public as well as industry) as required by Section 9701 of the Independent Offices Appropriation Act (IOAA).

Second, knowing that neither the general public nor industry will realize a tax reduction as a result of these proposed rules and also knowing that the costs associated with permit fees will ultimately be reflected in the cost of energy to the consumer (taxpayer), it seems that the taxpayer will be paying twice for the one service received. We fail to see how anyone benefits

from such a situation unless OSM's appropriation from tax revenues is reduced.

Section 507(a) of SMCRA provides that agencies may charge a permit fee not to exceed actual costs of reviewing, etc., not that they must. OSM in the preamble seems to be trying to justify the latter. When the large amount of public benefit is considered, it is not reasonable for OSM to expect to be able to recoup the entire cost.

While on the subject of the benefits that are provided by the government to industry, we would note that there are very substantial benefits provided by the industry not only to the government but to the general public as well in the course of permit review and approval. In fact, the permit approval process as performed by the government is significantly less in terms of cost, time and effort when compared to the myriad of environmental baseline studies, monitoring efforts, legal analyses, and extensive testing that attend industry's preparation of the permit application itself, mining plans and EISs. These efforts are of direct benefit to the general public and yet little regard is paid to them--especially in this proposed rule.

## 2. What Constitutes a "Service"

Section 9701 of the IOAA authorizes an agency to prescribe regulations establishing the charge for a service provided by the agency. Bureau of the Budget Circular No. A-25 of September 23, 1959, interprets that a special service exists when the agency's action:

- (a) Enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those which accrue to the general public (e.g., receiving a patent, crop insurance, or a license to carry on specific business); or
- (b) Provides business stability or assures public confidence in the business activity of the beneficiary (e.g., certificates of necessity and convenience for airline routes, or safety inspections of craft);
- (c) Is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group, or of the general public (e.g., receiving a passport, visa, airman's certificate, or an inspection after regular duty hours)." [Emphasis added]

Furthermore the circular goes on to read:

No charge should be made for services when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly

the general public (e.g., licensing of a new biological product)."

OSM cites a number of court cases as justification for their fee proposal. However, the cases cited dealing with the question of appropriateness of fees are for the most part cases where specific licenses or privileges were involved (e.g. privilege to operate cable television systems, license to operate a nuclear reactor).

In the case of surface coal mining, the right to mine exists by reason of ownership of the mining rights. No license or privilege is required to confer the mining rights. SMCRA does require a permit but that permit does not confer the mining rights or privileges in the sense of a license such as the licenses involved in many of the decided cases. Rather, the SMCRA permit is essentially a collection of conditions imposed upon the pre-existing right to mine. These conditions are imposed not for the protection of the interests of the coal mine operator or as conditions on the grant of a privilege that, except for the grant, would not exist, but rather they are imposed for the protection of the environment, which is clearly a public and not a private purpose.

Thus, it is difficult to see how the regulatory activities of OSM can be read to confer a "benefit" or thing of value (see National Cable Television Association vs. United States) on the coal mine operator independent of the benefit to the public at large. The coal mine operator is a beneficiary of OSM's regulatory activities only insofar as the coal mine operator is just another member of the public--clearly not a legally sufficient reason to impose on the operator the costs of OSM's regulatory activities. As has been repeatedly held, no charge for "services" should be made "when the identification of the ultimate beneficiary is obscure and the services can be primarily considered as benefitting broadly the general public." (National Cable Television vs. United States; OMB Circular).

In the decided cases "services" can be more readily discerned (e.g. franchise to broadcasting companies and assured freedom to operate without interference from others--e.g. limited competition (National Cable Television Association vs. F.C.C.), limitation on liability under the Price-Anderson Act available to NRC licensees (Mississippi Power & Light vs. N.R.C.)).

### 3. Determination of Reasonable Fees

The proposed rules ignore many of the precedent-setting provisions of the Federal Land Policy and Management Act (FLPMA) that enumerate what should be considered reasonable fees. Section 304 of FLPMA authorizes the Secretary of Interior to establish "reasonable filing and service fees and reasonable charges and commissions with respect to applications." Specifically, Section 304(b) provides:

The Secretary is authorized to require a deposit of any payments intended to reimburse the United States for reasonable costs with respect to applications and other documents relating to such lands. The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended. As used in this section "reasonable costs" include, but are not limited to, the costs of special studies; environmental impact statements; monitoring construction, operation, maintenance, and termination of any authorized facility or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead), the monetary value of the rights or privileges sought by the applicant, the efficiency of the government processing involved, that portion of the cost incurred for the benefit of the applicant, the public service provided, and other factors relevant to determining the reasonableness of the costs. [Emphasis added]

Section 507(a) of SMCRA provides that:

Each application for a surface coal mining and federal reclamation permit pursuant to an approved State program or a Federal program under the provisions of this Act shall be accompanied by a fee as determined by the regulatory authority. Such fee may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit issued pursuant to a State or Federal program. The regulatory authority may develop procedures so as to enable the cost of the fee to be paid over the term of the permit.

In the interest of uniformity of Department fee collection, we suggest that the precedent set by FLPMA guide OSM in their fee collection procedures.

Clearly the authors of FLPMA considered management overhead to be an unreasonable cost to be charged the land user (Section 304(b)). It is proposed in Section 701.12(b)(1) that costs to be accounted for and subsequently to be charged to the permittee are to include "direct and indirect cost of any labor, management, materials, machines, travel, overhead, contract, environmental study or document or other necessary or appropriate item of cost." Department regulations and procedures should consistently follow Congress' directives, in this case as stated in FLPMA. Management overhead charges are therefore inappropriate and should be eliminated.

Additionally, costs of supplemental environmental studies should only be recovered if they are requested by the applicant. For example, the review of an unsuitability petition filed by a citizen's group should not be charged to the applicant. If it were, this could encourage "harrassment" against mining companies

by having them pay for additional agency work. Such costs should not be incorporated into overhead costs.

Finally, costs incurred by other agencies within the Department of Interior should not be included, especially if those agencies do not charge OSM for their services. If such costs had to be paid by the applicant, it would either result in a "windfall" for OSM or double funding for the other agencies. Either situation is unacceptable.

#### 4. Accountability of Costs

OSM proposes in Section 701.12(d) procedures by which the recipient of a service can petition the Director to review the actual costs billed by OSM. The proposed rules will limit the petition to a challenge of the the amount charged versus the "actual cost incurred by the Department." While the Department should be accountable, equally important is the Department's efficiency when providing a service. Because the Department monopolizes the regulatory function in many cases, there are no natural checks on the Department's cost effectiveness.

Section 9701 of IOAA states that each charge shall be fair. Section 304(b) of FLPMA includes "the efficiency to the government processing involved." (sic) in the determination of what constitutes a "reasonable cost." We believe that Congress did not intend anything different for SMCRA permittees and therefore factors such as efficiency and comparability between services requiring similar efforts should be included in the criteria for determining permit fees and for challenging the billed cost.

A defined procedure for reviewing the Department's efficiency and allowing petitions to challenge the efficiency of the Department would help ensure adequate accountability. Without such a program, individual permittees may suffer the consequences of Departmental manpower turnover, lack of experience, lack of decision-making authority, etc., that can and have plagued many permitting efforts to date. The industry can cite numerous examples of permitting delays and inefficiencies but suffice it to say that the issue of Departmental efficiency and accountability is a major concern for us, especially as it affects actual costs.

#### 5. Fees to be Charged Regardless of the Outcome of the Review and Decision Process

OSM has tentatively concluded that it is appropriate for the permittee to pay for the agency's costs regardless of the outcome of the review and decision process. This is an absurd conclusion that has little precedent. As previously stated, the purpose of SMCRA is to ensure that mining operations are carried out in a manner that protects the environment, clearly a public purpose. Denial of a mining permit is obviously largely in the public's interest and not in the applicant's. Therefore, fees should not be charged when permit applications are denied.

On another related subject, we suggest that OSM make it quite clear that there is no intention on its part to recover the cost associated with legal proceedings under the Act. Any other position would lead to ludicrous results. Furthermore, the recovery of legal costs (attorney's fees) is already covered by statute or court rules.

#### 6. State and Cooperative Agreement Grants

OSM's proposed regulations address many of the proposals for cost recovery discussed in the draft report by the GAO with the notable exception of the proposal to phase out State and cooperative agreement grants. Because these proposed rules appear to be in response to the GAO report, it would be appropriate for OSM to more fully discuss its position. To exclude its position on this issue from discussion in this rulemaking and make the determination that a regulatory impact analysis is not required and then to later propose the elimination of State and cooperative agreement grants, is ineffective and inappropriate rulemaking.

#### 7. Inadequate Regulatory Impact Analysis

It appears that the proposal and the administration's policy is that recovery of costs will be proposed wherever non-public beneficiaries can be identified.

The overall implications and full comprehension of implementation of this precedent-setting policy will be enormous, affecting economics, markets, environmental impact, etc. Therefore, we urge OSM and GAO to perform a more extensive regulatory impact analysis on the policy as a whole.

Typical costs for processing permit applications are cited by OSM. The source of this data is unknown because OSM, by its own admission, first instituted the cost accounting procedures necessary for determining the actual cost of providing a service on October 1, 1984. Other costs are based on experience with programs such as those in Oklahoma and Tennessee--neither of which are considered to be typical of the majority of coal producing states given their different topography and geology. Like the economic impact analysis done by GAO, OSM's analysis of the economic impact on the industry is both cryptic and superficial. We urge OSM to re-examine the projected costs to various segments of the industry and the impacts of these proposals upon the competitive position of those segments.

In particular, the additional costs that a mining operation will incur because of the presence of Federal land need to be assessed. While it is suggested that some steps might be duplicated and therefore result in higher cumulative fees, OSM has failed to fully describe this duplication or the possible costs associated with it. Nor has OSM justified why a permittee must pay for OSM's oversight and review of cooperative program permits where the Secretary has delegated the permitting responsibility to the State.



OSM has further failed to realistically assess the cost for preparation of an environmental impact statement. Several examples are known where the cost for preparation of an EIS has exceeded \$200,000 for a western mine. Also, OSM has failed to estimate the costs many applicants incur gathering and preparing information for an EIS. As with mining plans and permits, the EIS largely benefits the public. The applicant, therefore, should not have to pay all or even most of the EIS preparation costs. In addition, a methodology should be designed whereby an applicant's costs can be credited against any possible fee.

Further, OSM failed to clearly identify whether inspection and enforcement fees were included in their analysis of the economic criteria in Executive Order 12291. Because OSM is soliciting comments on this alternative as well as others, it would be appropriate to evaluate whether inclusion of this alternative might trigger the need for a regulatory analysis.

#### B. Fixed vs. Actual Cost Fees

This aspect of OSM's proposal is plagued by many of the same deficiencies detailed above. Because inadequate OSM cost information is provided, we are unable to comment meaningfully on the fixed fee alternative proposed by OSM. While it is impossible at this time to take a position on this alternative, we must say that industry operates most efficiently when costs are known. When costs are unknown, risk is greater and operating efficiency is more difficult to gauge.

There are several other considerations that should be kept in mind here. As stated above, the awarding of coal supply contracts is often determined by a matter of pennies per ton. A fixed fee (or actual costs subject to a dollar limit or cap) would eliminate the uncertainty that coal companies would confront when trying to analyze their projected cost prior to submitting bids for coal supply agreements. A fixed fee or a fee cap would provide a constant figure, thus reducing the likelihood of incorrect analyses and estimates of cost that could prevent a company from being the successful bidder.

A fixed fee or fee cap will also discourage OSM from dilatory tactics in the course of its review that would increase the amount of money that it must recover. At the same time, it would encourage prompt turn-around time for permit processing and the other activities covered by the proposed rules.

OSM has only collected four months (Oct. 1984-Jan. 1985) of data on which to base their estimates of permit review cost. Our estimates, based on discussions with state agencies that have reviewed permits and/or prepared EISs, are considerably higher than OSM's estimates. Furthermore, OSM's estimates do not include costs of inspections, travel to the site, headquarters costs, overhead, or costs incurred during review by other agencies. Considering that the cost of each mid-term review could approach that of the initial review, the total cost paid to the

agency over the life of the mine would be substantial if all of these items are included, as OSM proposes.

By proposing to recover actual costs, OSM has made it impossible for companies to budget for permit review costs. Furthermore, there is no way of estimating how many revisions may be required by the agency, especially if its staff changes, or if a hearing is requested on the decision to issue or deny a permit. Companies will not be able to follow sound business principles if costs cannot be estimated in advance.

#### 9. Inspection and Enforcement Beneficiary

OSM's solicitation for comment on the possible alternatives for inspection and enforcement fees goes directly to the point that OSM has failed to address--who is the beneficiary of the regulatory program. Because OSM failed to address the issue of who the primary beneficiary is, the alternatives suggested are both incomplete and unacceptable.

Nevertheless, inspection and enforcement of SMCRA and permits issued pursuant to SMCRA are best addressed by OSM in its February 22, 1985, proposal at 50 Fed. Reg. 7525, where it states:

OSM is concerned about imposing economic burdens on operators in addition to permit application fees, Abandoned Mine Reclamation Fees, and for non-complying operators, civil penalties, all of which are charged under SMCRA.

The fees listed do not include state taxes, federal royalties and black lung trust fund taxes, all of which further exacerbate the plight of coal operators.

The nature of the SMCRA inspection and enforcement procedures is sufficiently different from those of the Nuclear Regulatory Commission (NRC) to distinguish the current situation from that set forth in Mississippi Power & Light Co. v. U.S. Nuclear Regulatory Commission, 601 F. 2d 223 (5th Cir. 1979). In the Mississippi Power case, issuance of a license and the subsequent inspections provided the licensee with a limitation of liability pursuant to the Price-Andersen Act, 42 U.S.C.A., Section 2210. The Court also stated that NRC inspections served to assist the licensee in complying with the Act, thereby assuring that he would be able to retain his license. A SMCRA permittee is provided no limitation on his liability by holding a valid permit. His being subject to routine mine inspections does not assist him in complying with all the terms of SMCRA, many of which require financial and other obligations that cannot be evaluated during a mine-site inspection.

The Congressional findings and the purpose of SMCRA clearly state the primary beneficiary of compliance with the Act's environmental standards to be the general public. Therefore, it would be arbitrary, capricious and contrary to law to charge the operator for the cost of any inspection or enforcement action.

The impropriety of seeking reimbursement for inspection and enforcement activity is accentuated where OSM's activity is the result of a third-party request or complaint (citizen's complaint). In such situations the permittee receives no benefit, and any service that is rendered specifically benefits the complainant and the cost should be reimbursed by him, if at all.

#### 10. Timing of Permit Fee Initiation

Because some existing operations still have not been permitted under the permanent program regulations, arbitrarily initiating a program for the collection of permit fees would be unfair for those operations. Many of these "unpermitted" operations have very complicated jurisdictional issues including federal, state, and Indian Lands. As a result, final permitting has been delayed. Charging existing operations a fee for issuing a permanent program permit would penalize these operations unfairly.

The proposal to retroactively collect fees is inappropriate since adequate public notice and opportunity to comment were not provided. OSM cites three reasons for retroactive fee collection:

1. OSM implemented the cost accounting procedures necessary for determining the actual cost of providing a service on October 1, 1984,
2. October 1, 1984, is the beginning of a new fiscal year, and
3. Federal programs were implemented in Tennessee and for Indian lands and the preambles to those programs put applicants on notice that costs incurred subsequent to October 1, 1984, could be recovered in a permit fee.

The Court in Public Service Co. of Colorado v. Andrus, 433 F. Supp. 144 (D. Colo. 1977) provided that retroactivity is not prohibited per se, but the proposals set forth in 50 Fed. Reg. 7528 can be distinguished from the facts in that case. In the Public Service case, only one notice of the effective date was published and the plaintiff had the opportunity to react accordingly. OSM's proposal is stated as a series of alternatives that provide a permit applicant with no clear notice of OSM's intention.

To make the effective date any time other than the date of final promulgation would be arbitrary, capricious and contrary to law.

11. Processing of Mining Plans Pursuant to the Mineral Lands Leasing Act of 1920 (MLLA)

The Court in In Re Permanent Surface Mining Regulation Litigation II, C.A. No. 79-1144 (D.D.C., filed May 11, 1979 (consolidated)) addressed the issue of OSM's responsibility to review mining plans pursuant to the MLLA in its memorandum opinion of July 6, 1984. All issues dealing with mining plan review addressed in that opinion are currently subject to appeal in the District of Columbia Circuit Court. OSM has indicated an intent to repromulgate the regulations addressed in the District Court opinion. Therefore, it would be premature for OSM to address the reimbursement of costs for the review of mining plans until such time as new regulations are promulgated and all legal remedies for their review have been exhausted.

Regardless of the outcome of the pending litigation, the mining plan review is a function performed by the Interior Department in its capacity as a manager of the public lands in question. The public, as the landowner, benefits from the review not the lessee-coal company. Furthermore, as the approval of mining plans is an MLLA function, OSM must look to that statute--and not SMCRA--for authority to assess and collect a fee for any costs associated with approval of the mining plan. To our knowledge, no such authority exists under the MLLA.

12. Federal Programs for States and Federal Enforcement of State Programs

The Joint Committee agrees that in states where OSM is enforcing a federal surface mining program, Section 507(a) permits the imposition of a fee for the review and administration of a permit issued pursuant to the Act. Failure to assess such a fee could create a competitive advantage for applicants operating in those states as opposed to applicants operating in surrounding states and similar market areas who pay a processing fee pursuant to a state program.

The federal permit fee in states with federal programs must, however, not be so high as to discourage the production of coal in those states. Section 101 of SMCRA finds that standards are necessary so that neither environmental controls nor coal production are discouraged. Fees that do not reflect a reasonable consistency among states will not ensure competition in interstate commerce as required by the Act (Section 101(g), SMCRA).

In states where OSM enforces a state program, the four situations set forth at 50 Fed. Reg. 7524 (Feb. 22, 1985) provide several examples where the applicant would be charged a fee by both the state and OSM for the same activity. The rule proposes the two fees because it would be too difficult to determine whether the state or OSM had actually performed an activity. It would appear that if OSM is keeping records sufficient to provide a detailed billing, the records should be sufficient to determine

whether the state or OSM had performed a given function. If difficulty in determining the state/federal share of a fee is justification for a double billing, then the proposal is so vague as to be arbitrary, capricious and contrary to both Section 507(a) of SMCRA and the Independent Office Appropriation Act.

### 13. Federal Lands in States with Cooperative Agreements

In states with cooperative agreements, all permit applications (initial permit applications, permit renewals, permit revisions, permit modifications, and technical design changes) are submitted to OSM for review and concurrence after the state regulatory authority has reviewed and approved the permit submittal.

In at least one situation, the approval of an initial permit in a cooperative agreement state took 3 and 1/2 years. A majority of that time was taken by OSM in the course of its review and concurrence function. Upon completion of that review and approval process, the state issued a mining and reclamation permit. In this situation, a permit fee was paid to the state. According to the proposed Section 740.13(b), OSM could also charge a fee for its review and concurrence activities.

OSM appears to be using the Mississippi Power case as justification for its position. The facts established by a cooperative agreement under SMCRA and the facts in Mississippi Power & Light v. U.S. Nuclear Regulatory Commission, 601 F. 2d 223 (5th Cir. 1979) are clearly distinguishable, however. "For companies operating waste disposal sites in an agreement state, then, a license must be obtained from both the state and the Nuclear Regulatory Commission (NRC)." (emphasis added) (Mississippi Power). Pursuant to 30 CFR 745.13, the Secretary does not reserve the authority to issue permits pursuant to a cooperative agreement. No identifiable benefit can be conferred upon the operator as a result of the duplicative activity undertaken by OSM in the course of its review and concurrence of a state decision, and a federal fee is not authorized by SMCRA or IOAA.

As a matter of public policy, a double fee creates a disadvantageous competitive position for cooperative agreement states. Where a few cents per ton can result in a coal operator losing a coal supply agreement in a competitive bidding situation, the increased cost of a double review could attract an operator to a different state that has no cooperative agreement. These competitive factors will cost cooperative agreement states royalty and tax income. Also, the shift in coal production from state to state could have a negative impact on the predictability of the federal coal leasing program.

### 14. Small Operator Fee

The proposed maximum fee of \$500 for small operators fails to meet any of the standards for cost reimbursement set forth in either the IOAA or National Cable Television Assn. (NCTC) Inc. v. United States, 415 U.S. 336 (1974). Therefore, it is arbitrary and capricious.

SMCRA does not provide justification for the proposed rule, either. While section 507(a) of SMCRA authorizes the collection of fees that reflect less than the actual cost of permit review and administration, it does not authorize the creation of two separate classes of permit applicants. Section 507(c) of SMCRA (Small Operators Assistance Program) applies only to OSM actions pursuant to Sections 507(b)(1) and 507(b)(15), neither of which refer to permit fees.

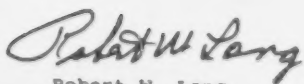
By establishing a maximum cost to small operators of \$500, OSM has further increased their competitive advantage on the spot market. Furthermore, such a cost may be even less than is now required to be paid to some state agencies, and would therefore encourage companies to enter the coal mining business on a one-time basis, and if they defaulted, the amount of money lost would be insignificant when compared to their profits, since such operators typically do not worry about reclamation or bond forfeiture. If smaller operators must be given a "break", perhaps they should pay a certain percentage (e.g. 5%) of the actual costs incurred by the agency in reviewing the application. Payment of such an amount would deter frivolous applications.

#### Conclusion

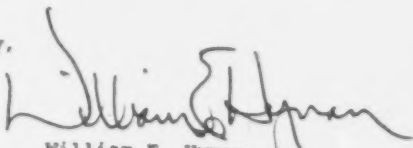
In conclusion, we believe that the proposal goes well beyond what is authorized by law. While SMCRA authorizes a fee, OSM has failed to separate the public versus the private benefits of their actions. The end result is a proposal that unreasonably places the financial burden on industry for an activity that largely benefits the public. OSM goes on to gloss over the economic implications of its proposal and to severely restrict its own accountability. Finally, OSM failed to address the economic implications of imposing fees for an activity that in its nature demands considerable interaction between the applicant and the agency and where the final sum of the fees is unknown at the onset of the process. Under the circumstances, we urge OSM to withdraw the rule and delay its reproposal until such time as the agency has more accurate and reliable data to support the rule and its impacts on the industry. To move ahead with the rule as presently proposed subjects it to challenge as arbitrary, capricious and inconsistent with law.

We urge you to give our comments your serious consideration. Should you have any questions or desire additional information, please contact us.

Sincerely,



Robert W. Long  
Vice President  
American Mining Congress



William E. Hyman  
Senior Vice President  
National Coal Association



Senator WARNER. Mr. Lyon.

**STATEMENT OF JAMES S. LYON, DIRECTOR, CITIZENS MINING PROJECT, ENVIRONMENTAL POLICY INSTITUTE**

Mr. LYON. Thank you, Mr. Chairman. I am James S. Lyon, director of the citizens mining project in the Environmental Policy Institute. I will make my comments very brief.

In the 1970's EPI led the fight in Washington for the passage of the Federal Surface Mining Act. In discussing this proposal, I'd like to do so in the broadest scope, and that is the one that's outlined in the GAO report.

In general, we believe that section 507 of SMCRA is very clear in providing the Secretary full authority to recover the full costs of regulation. In fact, many of the citizens and environmental groups that we work with out in the coal fields support this provision. It is their belief that the coal industry, not the Nation's taxpayers, should bear the cost of regulation.

And in this, EPI agrees fully with these groups in theory. However, in reality, we harbor some deep concerns for the practical ramifications of this proposal at this time. Basically, there's three areas of concern that we have. No. 1, this proposal may undercut the State's desire to hold primacy, continue to hold primacy, which has already been pointed out. If this permit fee proposal is implemented, I think it removes a real incentive for the States.

When faced with the unsavory option of recovering the regulatory costs, certain States may be forced, rather than face the political heat, to return it back to OSM. EPI has always supported the concept of primacy, as long as the States fully comply with the law.

OSM is presently very poorly equipped to take over direct authority in any more States than it already has.

Our second concern is that this proposal threatens the quality of regulation and enforcement, and this is a point that really hasn't been spoken about today. We're concerned that the political pressures associated with this proposal may act to undercut program adequacy. Rather than raise the fees to levels adequately to fund program activities and enforcement actions, the regulatory agencies may opt for cutting back on services.

OSM has apparently recognized this concern in its proposed rule by exempting fee assessments for inspection and enforcement. OSM stated that it did not wish to inhibit enforcement performances by any inadvertent concern for the costs that may be imposed on surface mining operators resulting from such activities.

Now, while we agree with OSM, we are just as concerned over the influence that this proposal can generate over adequate permit as well. We are presently very concerned about the poor quality of permit review in many States and on Federal lands, and we feel that this proposal further invites agencies to take technical shortcuts in certain required and essential high-cost review areas, such as cumulative hydrologic impact analysis in order to simply keep the permit review costs down.

And, finally, our third concern is that OSM has a dismal record in its collection of fines and fees. Since its inception, OSM has dis-

played an incredibly pitiful performance in the collection of civil penalties and abandoned mine land fees.

At this time we have absolutely no confidence that OSM is capable of ensuring a competent collection program under this proposal. If this proposal is implemented at this time, I guarantee you that in the ensuing months and years, we will be all back here together discussing how OSM has failed to collect millions of dollars in outstanding permit fees.

In general, I find it difficult to believe that OSM is pushing this initiative. The Secretary has acknowledged the fact, as we have known for some time, that OSM is facing serious problems. Clearly, Mr. Christensen these days is focusing his resources on resolving OSM's most pressing problems in getting the Agency back on its feet. This proposal does nothing to solve those problems and should not be a priority.

Furthermore, we've been told, as has been pointed out today, that the real proponent of this proposal is the Office of Management and Budget. And if that's so, we alert the subcommittee that this marks yet a further intervention and meddling by this super agency into the regulatory affairs and responsibilities of other Federal departments.

It can be extremely dangerous to hinge the purpose and need for regulation on the cost of regulation. It is apparent that the authors of this proposal have either not considered nor cared about the ramifications that this policy brings to the coal fields.

Thank you.

[The prepared statement of Mr. Lyon follows:]

**ENVIRONMENTAL POLICY INSTITUTE**

**WRITTEN TESTIMONY  
OF  
JAMES S. LYON  
DIRECTOR  
CITIZENS MINING PROJECT**

**BEFORE THE  
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE  
SUBCOMMITTEE ON NATURAL RESOURCES DEVELOPMENT  
AND PRODUCTION**

**9 JULY 1985**

Thank you Mr. Chairman, I am James S. Lyon, Director of the Citizens Mining Project for the Environmental Policy Institute (EPI). EPI is a non-profit, tax-deductable, public interest organization dedicated to research and lobbying for sound energy and natural resource management policy. In the 1970's, EPI led the fight in Washington for the passage of the federal Surface Mining Control and Reclamation Act (SMCRA). After Congress passed this landmark legislation in 1977, EPI established its Citizens Mining Project to monitor the Office of Surface Mining (OSM) and the states' compliance with the law. In addition, the Project assists coalfield citizens to better understand and exercise their rights under this Act.

The issue of whether or not to assess and collect mining permit fees at levels adequate to recover the costs of the regulatory requirements of SMCRA is a far-reaching proposal with many long term ramifications. In discussing this permit fee proposal, I am speaking of it in its broadest scope, that is the concept proposed in the recent General Accounting Office report (GAO/RCED-85-33, May 28, 1985). This concept proposes that permit fees be raised to cover the cost of the complete regulatory program on all lands whether they be under federal or state authority. While OSM has yet to publish its final rule on this subject, and despite the fact that the proposed OSM rule was limited in its scope, it is our opinion that this OSM rule is designed to "test the waters" for a complete recovery proposal to be applied later. Limited application conflicts with SMCRA's intent for uniform national standards by proposing a competitive atmosphere between operators who must pay higher permit fees and operators whose regulation is covered by federal and state taxes. Therefore, it is under the ultimate application that I intend to address my comments today.

Initially, we believe that Section 507(a) of SMCRA is very clear in providing the Secretary the full authority to recover the full costs of reviewing, administering, and enforcing a mining permit through the assessment and collection of permit fees.

"Each applicant for a surface coal mining and reclamation permit pursuant to an approved State program or a Federal program under the provisions of this Act shall be accompanied by a fee as determined by the regulatory authority. Such fee may be less than but shall not exceed the actual or anticipated cost of reviewing, administering, and enforcing such permit pursuant to a State or Federal program."

Many local citizens and environmental organizations with which we work in the coalfields support this provision. It is their belief that the coal industry, not the nation's taxpayers, that should bear the cost of permit review and regulation. EPI agrees fully with these groups. And in theory agrees with the implementation of this proposal.

However, in reality, we harbor deep concerns with the practical ramifications that this proposal brings at this time. The complexity of this proposal's implementation raises many questions. For instance: Who will set the permit fees, OSM and/or the states? Will the state legislatures be able to play a role? Will there be a set national fee; a national minimum standard; or site specific rates?

Regarding specific implementation, we are concerned about three areas of practical application.

This proposal may undercut the states desire to hold primacy.

There are three basic reasons for a state to seek primacy.

1. A desire to regulate mining within its boundaries.
2. To be eligible to receive millions of dollars in state share AML grants, only available to primacy states.
3. To receive, on a cost sharing basis, millions of dollars in federal grants to administer their regulatory program.

State governments are often subjected to problems, pressures, and dilemmas which can make the first reason less inviting than before. Furthermore, as AML state share grants grow smaller in certain states, the second incentive for primacy is weakened. And finally, if this proposal is implemented, the third incentive

for holding primacy, the reception of federal program grants, is removed altogether. Thus, faced with the unsavory option of recovering the regulatory costs from industry, certain states, rather than face the political "heat" might seek to pass this burden onto OSM.

EPI has always supported the concept of primacy as long as the states comply with and enforce the law. OSM is presently poorly equipped to take over direct authority in any more states than it already has.

**This proposal threatens the quality of regulation and enforcement.**

We are concerned that the political pressures associated with assessing higher permitting costs for industry might act to undercut either the states' or OSM's ability to implement a fully staffed program adequate in fulfilling its legal responsibilities. Rather than raise fees to levels needed to adequately fund program activities, or enforcement actions, the regulatory agencies may opt for cutting back on services. OSM apparently recognized this concern in its proposed rule by exempting fee assessments for inspection and enforcement actions. OSM states that it did not wish to inhibit enforcement performances "by any inadvertent concern for the costs that might be imposed on surface mining operators resulting from such activities." While we agree with OSM, we are just as concerned over the influence that this proposal can generate over adequate permit review as well. We are presently very disturbed over the poor quality of permit review in many states and on federal lands. This proposal further invites agencies to take technical shortcuts in certain required and essential high cost review areas, such as cumulative hydrologic impact analysis, in order to keep permit review costs down.

**OSM has a dismal record in its collection of fines and fees.**

Since its inception, OSM has displayed an incredibly pitiful performance record in its collection of civil penalties and Abandoned Mine Land (AML) fees. OSM has recently been under tremendous Court pressure to collect millions of dollars owed by companies in violation of the Act for years. Furthermore, OSM was recently subjected to an intense GAO investigation of the Agency's failure to properly audit and collect millions of outstanding dollars in AML fees, which will be the subject of a



House Government Operations Subcommittee hearing on July 11th.

At this time, we have absolutely no confidence that OSM is capable or willing to ensure a competent collection program under this proposal. We are especially concerned about OSM's proposal to allow an operator to stretch fee payment out over a period of several years. Mark my words, if this proposal is implemented at this time, I guarantee that in the ensuing months and years, we will all be back here discussing how OSM failed to collect millions of dollars in outstanding permit fees.

In general, I find it difficult to believe that it is OSM that is pushing this initiative. The Secretary has acknowledged the fact, as we have known for some time, that OSM has serious problems both in management and enforcement. Clearly Mr. Christensen is mainly focusing on resolving OSM's most pressing problems and in getting the Agency back on its feet. This proposal does nothing to solve OSM's problems, and in our opinion should not be a priority for OSM.

We have been told from a variety of sources that this fee proposal is being pushed by the Office of Management and Budget (OMB). If so, we alert this Subcommittee that this marks yet further intervention and meddling by this "Super Agency" into the regulatory affairs and responsibilities of other federal departments. It can be extremely dangerous to hinge the purpose and need for regulation on the cost of regulation. It is apparent that the authors of this proposal have either not considered, or not cared about, the ramifications that this policy will bring to the coalfields.

Senator ROCKEFELLER [presiding]. Thank you very much, all three.

Let me just make one point to you, Mr. Lyon. I found your point of view interesting, and I agree with it, just because you stated very clearly and from an environmental point of view, the Institute's point of view, that primacy in fact does work, number one, and in that the States have it, and it's therefore called primacy, that it's far better done by them than by OSM itself.

That was in contrast to earlier years when it was felt that giving it to a State was a great risk and the States wouldn't be serious about it, but, in fact, they are, and for the most part, it seems to be working quite well.

You also, I thought, implied—and I would agree with you if you did—that there have been so many changeovers in OSM and there's been so much sort of confusion, that there is a great deal that needs to be done of a higher priority. OSM in so-called getting its act together, where we are quibbling over \$9.4 million for whatever purpose, certainly not budget reduction; if that's its purpose, it's not a very worthy one; the other side being tremendous confusion.

So, I found those comments coming from you very important and very helpful to me.

Mr. LYON. Thank you. I would like to just underline this is a major proposal, as we know, and it is simply something that I don't feel OSM is in a position to undertake. And I don't really believe that they are the ones pushing it. If they are forced into a position at this time, I think that we really need to look at reality and see if they're capable to undertake something like this, and I don't think they are.

Senator ROCKEFELLER. No further questions, Mr. Chairman.

Senator WARNER [presiding]. Thank you very much.

We will now hear from our final panel. We thank this panel and wish you a safe journey back.

We'll have Mr. Meyers, Mr. Studer, and Mr. Neill.

Gentlemen, we thank you for your patience. You've had the benefit of hearing the prior testimony. Your statements will be included in the record in full, and the subcommittee would be anxious to learn of those further points, not covered heretofore, which you think are germane and important to the subcommittee's work on this issue.

We'll start off with Mr. Meyers, general manager, Washington Irrigation & Development Co., Centralia, WA.

**STATEMENT OF LLOYD H. MEYERS, VICE PRESIDENT AND GENERAL MANAGER, WASHINGTON IRRIGATION & DEVELOPMENT CO.**

Mr. MEYERS. Mr. Chairman, members of the subcommittee, I cannot speak for the whole coal industry. I can only speak for my company, but we have had some experiences in dealing with OSM, and I'd like to mention those experiences.

I am vice president and general manager of WIDCO, Washington Irrigation & Development Co. WIDCO's operation is in the State of Washington, which is a Federal program State and includes Fed-

eral coal leases. We stand to be significantly affected by OSM's proposed rules to collect permit application fees.

WIDCO is the largest coal producer in the Pacific Northwest and is a subsidiary of a major utility serving that region, the Washington Water Power Co. WIDCO's 725 employees will produce approximately 4.5 million tons of coal at the Centralia Mine in 1985 to fuel the adjacent Centralia Steam Electric Generating Plant.

The plant is owned by eight publicly and privately owned northwest utilities. Power generated at Centralia is distributed to households and industries throughout the Northwest.

Today my testimony will focus on two issues: First, OSM's lack of economic or regulatory analysis; and second, economic impacts to the proposed rule. Under Executive Order 12291 OSM is obligated to assess the costs of its proposed rule. OSM has failed to adequately assess its own costs. WIDCO to date has spent close to \$3 million preparing its permit application. As evidenced by the many months required to OSM to review our permit and the numerous phone calls and letters between our office and OSM's, we know that OSM's review efforts have been substantial and costly.

Our experience is typical for the industry, especially in the West. Permit review costs, however, do not stop with those incurred by OSM. OSM intends to recoup all of the actual costs incurred by other agencies of the Department which may include significant coal lease administration costs. Both OSM and GAO studies make no attempt to estimate those costs.

OSM's superficial economic and regulatory analysis is totally inadequate and substantially underestimates the cost. Additionally Executive Order 12291 requires assessment of the impact of increased regulatory costs. The proposed rule will have a significant impact on the economy. WIDCO's customers are in direct competition with other sources of electric power, including U.S. and Canadian sources.

Any increase in the cost of coal can translate into reduced mine and power plant production in the United States and an increase in Canadian imports. Imported power or imported coal for steam generation significantly impacts the national economy and the balance of payments.

Increased permit costs most certainly will have an impact within the State of Washington. Reductions in mining and power plant production directly translate into reduced State and local tax revenues and decreased employment. Federal coal royalties may also be affected.

Permit costs ultimately pass through to the consuming public. Surely OSM and GAO understand public concerns about increased costs of electric power. Shifting of power demand between coal-fired and other generating plants does not offset the costs. Eventually the consumer pays more.

OSM's proposal skirts the issue of whether the agency should assess full cost or a reasonable fixed fee, while some apparently assume that sections of SMCRA which allow some fee collection impose a duty to collect full costs. WIDCO believes that when Congress authorized the Act, it had in mind a low level of permit costs. Hence, permit review costs would be low. We do not believe Congress envisioned the enormity of the costs realized.

WIDCO and its customers would not be the only parties affected by OSM's fees. The entire coal industry is confronted with similar impacts. OSM's proposal has unresolved economic and legal issues, including the question of whether any fee should be imposed. We solicit your support in effecting a withdrawal of the proposal until these issues are resolved in a manner that is economically reasonable and in keeping with what we believe Congress envisioned at the writing of the act.

Thank you for allowing me this opportunity to speak.  
[The prepared statement of Mr. Meyers follows:]

Statement on Impact on the Coal Industry of  
the Office of Surface Mining's Proposed  
Rulemaking to Collect Permit Application Fees

Mr. Lloyd H. Meyers,  
Vice President & General Manager  
Washington Irrigation & Development Company (WIDCO)  
1015 Big Hanaford Road  
Centralia, WA 98531

to the

Subcommittee on Natural Resource Development and Production  
Senate Energy and Natural Resources Committee

July 9, 1985

Mr. Chairman, Members of the subcommittee.

We appreciate your interest and initiative in holding this hearing. The issue of permit fees is of great importance to our company and the entire coal industry.

My name is Lloyd Meyers. I'm Vice President & General Manager of WIDCO, the Washington Irrigation & Development Company. WIDCO's operation in Washington, a Federal Program State, includes federal coal leases. We stand to be significantly affected by OSM's proposed rule to collect permit application fees.

WIDCO is the largest coal producer in the Pacific Northwest and is a subsidiary of a major utility serving that region, The Washington Water Power Company. WIDCO's 725 employees will produce approximately 4.5 million tons of coal at the Centralia Mine in 1985 to fuel the adjacent Centralia Steam-Electric Generating Plant.

The Plant is owned by eight (8) publicly and privately owned northwest utilities. Power generated at Centralia is distributed to households and industries throughout the Northwest.

WIDCO has previously submitted extensive technical comments to both GAO and OSM on the proposed permit fees. Copies of those comments are submitted for your consideration.

Today my testimony will focus on two issues:

1) OSM's lack of economic or regulatory analysis, and 2) the economic impacts of the proposed rule.

Under Executive Order 12291, OSM is obligated to assess the costs of its proposed rule. OSM has failed to adequately assess its own costs. WIDCO has to date spent close to three million dollars



preparing its permit application. As evidenced by the many months required for OSM to review our permit and the numerous phone calls and letters between our office and OSM's, we know that OSM's review efforts have been substantial and costly. Our experience is typical for the industry, especially in the West.

Permit review costs, however, do not stop with those incurred directly by OSM. OSM intends to recoup all of the actual costs incurred by other agencies of the Department, which may include significant coal lease administration costs. Both OSM and the GAO study make no attempt to estimate those costs.

OSM's superficial economic and regulatory analysis is totally inadequate and substantially underestimates the costs. Additionally, Order 12291 requires assessment of the impact of increased regulatory costs.

The proposed rule will have a significant impact on the economy. WIDCO's customers are in direct competition with other sources of electric power, including U.S. and Canadian sources. Any increase in the cost of coal can translate into reduced mine and power plant production in the U.S. and an increase in Canadian imports. Imported power or imported coal for steam generation significantly impacts the national economy and balance of payments.

Increased permit costs most certainly will have an impact within the State of Washington. Reductions in mining and power plant production directly translate into reduced state and local tax revenues and decreased employment. Federal coal royalties may also be affected.

Permit costs ultimately pass through to the consuming public. Surely OSM and GAO understand public concerns about increased costs of power. Shifting of power demand between coal fired and other generating plants doesn't offset costs. Eventually, the consumer pays more.

OSM's proposal skirts the issue of whether the agency should assess full costs or a reasonable fixed fee. OSM apparently assumes that sections of SMCRA which allow some fee collection impose a duty to collect full costs. WIDCO believes that when Congress authorized the Act, it had in mind a low level of permit costs. Hence permit review costs would be low. We do not believe Congress envisioned the enormity of costs realized.

WIDCO and its customers would not be the only parties affected by OSM's fees. The entire coal industry is confronted with similar impacts. OSM's proposed rule has unresolved economic and legal issues, including the question of whether any fee should be imposed. We solicit your support in effecting a withdrawal of the proposal until these issues are resolved in a manner that is economically reasonable and in keeping with what we believe Congress envisioned at the writing of the Act.

Thank you for allowing me this opportunity to speak.



Washington Irrigation & Development Co.  
1015 Big Hansford Road  
Centralia, Washington 98531

April 26, 1985

Office of Surface Mining (OSM)  
Administrative Record  
Room 5315L  
1951 Constitution Ave. NW  
Washington, D.C. 20240

Gentlemen:

Re: Proposed Rule - Application Fees, Etc. - 50 FR 7522  
et. seq., February 22, 1985 (30 CFR Parts 701, 736,  
740, 746, 750 and 772)

Washington Irrigation & Development Company (WIDCO) appreciates this opportunity to comment on the proposed rules. WIDCO is an operator in a Federal Program State, with Federal coal leases which trigger certain mining plan review requirements. Thus, we stand to be significantly affected by the proposed rule.

WIDCO has followed with some interest the subject of potential OSM permit fees. In 1983 and 1984 we submitted extensive comment to the U.S. General Accounting Office (GAO) on their draft proposals dealing with OSM's potential recovery of regulatory costs. Comments submitted with this letter address both the philosophy of fee collection and specific 'mechanics' associated with the proposed rule.

WIDCO, the largest coal producer in the Pacific Northwest, is a subsidiary of a major utility serving that region, The Washington Water Power Company. WIDCO's 700 employees will produce approximately 4.2 million tons of clean coal at the Centralia Mine in 1985 as fuel for the adjacent Centralia Steam-Electric Generating Plant. Since operations began in the early 1970's, the mine has produced over 50 million tons of coal.

The Centralia Steam-Electric Plant is owned and operated by eight (8) northwest utilities: Pacific Power and Light Company; The Washington Water Power Company; Puget Sound Power and Light Company; Portland General Electric Company; Seattle City Light; City of Tacoma; Snohomish County Public Utility District No. 1; and Grays Harbor Public Utility District No. 1. The electric power generated at Centralia is distributed to households and industries throughout the Northwest. WIDCO is thus an important part of the Pacific Northwest community, and new regulations and costs profoundly affect not only its employees but many residents in the region.

WASHINGTON IRRIGATION  
& DEVELOPMENT COMPANY

Office of Surface Mining  
April 26, 1985  
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WIDCO has always demonstrated a strong commitment to environmental concerns, and these efforts have been rewarded both by local and national recognition. Yet, in spite of the fact that only nominal physical changes have been required to bring our operations into conformance with OSM's regulatory programs, our operation has already been significantly impacted by the 1977 Surface Mining Control and Reclamation Act (SMCRA). For example, through the first quarter of 1985, Abandoned Mined Land fees paid by WIDCO exceeded 11.5 million dollars. Additionally, as noted below, WIDCO has incurred significant costs in developing its Federal mining permit application, and bonding costs will increase by over an order of magnitude under WIDCO's Federal permit.

The GAO draft report addressed a cost collection program of a different scope than the proposed rule, with cost impacts potentially exceeding \$100 million per year. WIDCO understands that OSM believes the current proposal is apparently less broad in scope or cost impact than GAO's study, but we are profoundly disturbed by OSM's inability to project what the cost impact will be. This is especially true since the GAO report only addressed OSM internal costs and did not include the broader Department of Interior cost pass through scheme proposed by this rule. Indeed, given the cost uncertainty, WIDCO believes that OSM is procedurally prohibited from proposing a rule at this time. Until such time as OSM can provide specific information on the national and individual cost impacts, the proposed rulemaking must be withdrawn. Total costs proposed by this rule may pass the annual \$100 million "trigger point" for major rule regulatory impact analysis. Even if they do not, the rule will still result in substantive increases in costs to consumers, state and other government agencies, and impact various geographical regions such as the Pacific Northwest.

The requirement for more specific information is far from academic. We are aware of Presidential direction requiring the recipient of federal "services" to pay for those services. What may not be clear to Federal officials is the ability of an affected industry to recover its increased costs. WIDCO's GAO comments, attached, point out the severe stress and pricing pressures facing the domestic coal industry. Increased price pressure, whatever its source, poses the threat of shifts either to foreign production or from coal to other sources of energy including imported electricity. These other sources present the possibility of further adverse shifts in the nation's balance of payments.

WASHINGTON IRRIGATION  
& DEVELOPMENT COMPANY

Office of Surface Mining  
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Further, since the proposed rule will not equally affect all U.S. producers of coal, it is logical to conclude that regional shifts in coal production may occur. In addition to varying impacts on regional economies, there may also be direct impacts on levels of Federal coal production, potentially changing treasury receipts from leased coal lands. WIDCO has already spent over two (2) years and close to three million dollars preparing its OSM mining and reclamation permit application. WIDCO's non-controversial operation, which incidentally does not require an EIS for permit approval, should not be charged additional costs associated with the "services" provided by OSM in reviewing its application.

Regarding "services", WIDCO fails to understand who is being served. We have not seen any substantive benefits to our operation as a result of SMCRA. The mine was already known for its strong environmental protection record. If there is any value attached to OSM's service, that value flows to the entire American public. Section 101 of the Act clearly points out that the requirements were to be imposed to protect the public welfare (§ 101(c)). Section 102(a) reiterates the theme of "protecting society and the environment". The services received are thus already being paid for by their beneficiaries, out of general tax revenues, and payment should remain with that source. Imposition of new fees on WIDCO, without concurrent tax relief, constitutes a double taxation and duplication of charges, and would in any event relieve the true recipients of OSM's service (the public) from their obligation to pay for those services.

Further, should a fee be imposed for permit review, WIDCO believes it would act as a disincentive to providing data during permit review. As OSM's rulemakers note in the preamble (40 FR 7527, Col. 1, last paragraph) each applicant is to be charged only for actual costs, "and (thus) has an incentive to cooperate in reducing the cost incurred, by the agency". WIDCO has provided extensive data to OSM to aid its permit reviewers. At considerable cost, we have provided more than the minimum requirements, to demonstrate our good faith efforts to comply and to most fully explain our operation. If review charges increase because agency personnel spend more time reviewing data, an operator's natural instincts will focus on providing minimum data. While OSM might argue that the agency would eventually obtain the data in any event, WIDCO believes that the net effect of the rule would be to chill free interchanges of information. Indeed, the operator is faced with the disincentive of not seeking to clarify issues since he will be charged for their clarification.

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Additionally, OSM has provided no incentive for its own reviewers to process permits efficiently. Large surface mines such as WIDCO's are inherently complex operations. Often, successful mining and reclamation practices are very site specific and have been developed over long periods of time. The regulatory process generically seeks a common (middle) ground, and does not deal well with exceptions to perceived "normal" practices. As a result, regulatory staff typically require considerable dialog both internally, and with an operator, before successful proven working practices can be approved. WIDCO's permit, for instance, has taken over eighteen (18) months to review.

Since WIDCO began preparation of its mining and reclamation permit in 1982, there have been significant changes in agency personnel. For instance, five different permit project engineers have been assigned to work with WIDCO, and we expect shortly to begin training a sixth. Every time a direct contact agency staff member is either reassigned or leaves the agency, WIDCO has to start once again the process of providing orientation on both its field operations and on the content and substance of its permit. We have already been penalized severely by delayed actions resulting from assignment of new agency personnel. OSM's open-ended proposal for imposing fees which would in essence penalize us for the agency's inefficiency is little short of outrageous. Perhaps, if OSM feels that fees are justified, it would be willing to reimburse the operator for his cost incurred in training of agency staff, and for the duplicate costs he incurs as a result of agency delays and staff changes.

Coupled with a changing regulatory and legal environment, and with all the other complex administrative as well as organizational structural changes OSM has confronted, the bottom line is that the operator is faced with long, drawn out, excessively costly Federal review. He has no control over the mounting regulatory costs he faces, and no way to estimate their magnitude. The result will be increasing confrontation and polarization between operators and OSM.

When enforcement of SMCRA has been most effective, it has occurred in an atmosphere of open dialog and cooperation between OSM and the operator. All questions of cost impact aside (and these will be more significant than OSM appears to realize) the proposed rule thus acts as a disincentive to achieving the intent of the Act. WIDCO recommends that OSM not proceed with its rulemaking. Realizing, however, that OSM has asked for technical comments, we have also prepared a number of specific comments on the proposal, which are attached.

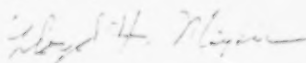


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Thank you for the opportunity to comment. Please do not hesitate to contact us if we can be of assistance in clarifying our comments.

Sincerely,



Lloyd H. Meyers  
Vice President and General Manager

Encl. (Parts 2, 3, and 4)  
amt

cc w/enclosures:

J. Ward - OSM, Washington, D.C.  
J. Kress - OSM, Washington, D.C.  
A. Klein - OSM, Denver, CO  
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W. Thomas - OSM, Mills, WY  
R. Lasmanis - DNR, Lacey, WA  
P. Saad - State Energy Office  
P. Redmond - TWWPCO  
J. Harvey - TWWPCO  
A. Still - WIDCO  
R. Brown - WIDCO  
L. Dahmen - WIDCO  
J. Wisch - WIDCO  
J. Robison - WIDCO  
J. Boyd - Paine, Hamblen, Coffin & Brooke  
D. Sturges - Delaney & Balcomb, P.C.  
A. Czarnowsky - ACZ Inc.  
L. Zell - Mining and Reclamation Council  
R. W. Long - American Mining Congress  
M. Jones - NERCO

PART 2

DISCUSSION OF FOUR SIGNIFICANT ISSUES RAISED BY OSM

Issue 1 - For which OSM Services Is a Fee Appropriate

As noted in its transmittal letter, WIDCO believes OSM should not impose a fee for any of its activities. WIDCO has carefully considered OSM's explanations, including those at 50 FR 7525, wherein OSM explains how it provides a service and substantial benefit in reviewing and processing permits. OSM also notes that "not requiring such reimbursement would be inconsistent with sound budgetary principles". WIDCO disagrees. WIDCO does not consider that it receives any services from OSM (see WIDCO's comments on the Proposed Implementation Date). Further through payment of Federal income taxes WIDCO, its employees, suppliers, and the rate making public already support the enforcement of the Surface Mining Control and Reclamation Act (SMCRA). Regulations under this act have already imposed significant additional costs of operation (permit costs, mined land reclamation fees, etc.). As a careful, environmentally conscious operator, WIDCO has had to make only minor changes to its actual operating practices while incurring these new extraordinary charges. WIDCO believes the entire general public should share in benefits received, by funding SMCRA through the general fund. Operators should, as at present, be liable for violations of regulatory requirements. They should not be liable for general regulatory administrative costs.

If, nonetheless, OSM imposes fees, then an entire list of situations (applications, renewals, revisions, modifications, etc.) seems logical and standard fees of a reasonable nature should be enumerated on a predetermined schedule. Fees should not be allowed to float, be discretionary or put the cost burden for slow inefficient agency revisions on the operator. WIDCO believes that OSM should not impose a fee to cover the cost of Inspection and Enforcement (I&E). WIDCO agrees with OSM's suggestion that a fee should not be imposed for notices of intent to explore.

Regarding Inspection and Enforcement, OSM has (50 FR 7525) correctly noted the economic burden fees impose. In its analysis of fee alternatives (50 FR 7526) OSM correctly points out the many problems with assessing I & E amounts if fees are imposed. As one of only two operators in a Federal Program state, WIDCO is particularly concerned about the magnitude of fees imposed under a full cost allocation. As with other "services" received under SMCRA, WIDCO believes I & E costs should be funded out of general tax revenues.

Should an I&E fee be imposed, it should be based on a fixed annual cost, at significantly less than full cost. OSM's suggestion of a fifty percent allocation is viewed by WIDCO as an upper starting point, but the percentage should be lowered. Costs should not be added to a basic permit fee, but should be collected annually at the end of a service year.

Considering all of the questions of cost allocation, WIDCO believes that OSM was correct in not proposing an I & E fee, and should not consider further its alternative fee schemes.

OSM has not discussed who will be liable for costs incurred as a result of citizen involvement, except to state that the operator must pay for preparation of environmental impact statements. As OSM is aware, there are many places for interested citizens to interject themselves in the SMCRA process (i.e. hearings, inspections, legal challenges to permits and actions, etc.). If, for instance, OSM reimburses an intervenor group for costs incurred in a challenge, would OSM subsequently pass those costs through to the challenged operator? A back handed billing such as this is not only ludicrous, it is also insulting, and WIDCO strenuously urges OSM to clarify this is not its intent. Public benefits such as these clearly must be borne by the public.

Issue 2 - If fees are imposed, should they be calculated on a fixed or actual cost basis.

WIDCO understands OSM's reasoning that if fees are imposed they should be on an actual cost basis. However, per our comments on Issue 3 below, WIDCO believes that OSM's proposed range of costs to be assessed is too broad. And, as noted in our transmittal letter, WIDCO believes that imposition of actual charges provides a severe disincentive to operators either providing clarifying data to the agency or seeking approval of innovative techniques to achieve the intent of SMCRA. OSM is essentially proposing the imposition of "cost-plus" charges, to use contractor terminology. It is widely recognized that such contracts provide no incentive for the billing party to be efficient. Surely, as recent problems with Defense Department contracts prove, such procedures are inherently inefficient. If the Federal government expects industry to "play fair" then surely it is also obliged to do so. To do otherwise is to subject the operator to the cost penalties resulting from idealistic, often academic, abstract judgement calls by regulators.

OSM has already noted at least one situation (Substitution of Federal Enforcement, or Implementing a Federal Program, 50 FR 7524, Col. 3, Item 2) where just such a situation may occur. The author of the preamble notes "to charge permit holders a fee under such circumstances would expose them to potentially significant, but unforeseen and unpredictable expenses over which they would have



little or no control". OSM's only error in this analysis is its failure to extend this reasoning to the probability of similar problems in every other part of its rule.

As an alternative, has OSM considered the application of a fixed nominal moderate fee which would allow it to recover some but not all of its actual costs? As OSM has noted in the preamble to the rule, it may collect full costs but is not obliged to do so. Although WIDCO would dispute that OSM can legally impose any fee at all (see WIDCO comments to "Proposed Implementation Date"), a fixed fee in a nominal amount would be more appropriate to the coal industry. Although some (few) federal agencies may utilize full cost collection, the more common practice is to utilize fixed fees of nominal amounts for licenses and permits.

The ability of the coal industry to recover increased regulatory costs from its customers is limited, as WIDCO notes in its attached GAO comments, due to the complex nature of downstream electric rate approval processes. If, for instance, a mine operator has a "pass-through" contract, he may be able to bill his customer for new unanticipated charges. However, although in theory the benefited customer (a consumer of coal fired electric power in this case) pays for the service he receives, in practice he does not fully do so. As a result, the mine and/or power generator absorbs increased costs with no offsetting benefit and substantial economic penalty. And, for those many mines with contracts which do not allow the charges to be passed through, or for open market (spot) sales, or for these situations where operators in adjoining states may see quite different levels of OSM costs, the operator bears the full burden. These burdens include lost revenues, lost sales, and - not infrequently - closure of the mining operation itself.

Issue 3 - What Specific Items or Activities Involved in Providing a Service

Should the Fee Cover?

OSM has proposed an extensive list of cost items and "services", and "service centers", in its proposed rule. Some cost items such as labor, fringe benefits, materials, travel, contracts, and environmental studies may be easy to identify. Others such as machines, office space, heat, and light may be allocated but the allocation basis will be subject to considerable challenge. Finally, charges for supervision and management present special opportunities for conflicting allocation.

For instance, how much of a supervisor's time is allocated to a particular permit? Does OSM plan to simply prorate all of the supervisor's time against permits then being processed? Which supervisors are involved in permit review? Should their general administrative duties be chargeable? (WIDCO believes not). And, if small operators are exempted, will their costs be included in the base which large operators assume?

Who is "management"? OSM, in its preamble, continually refers to full collection of costs incurred by the Department (of Interior) and not just OSM. Does "management" extend to the level of the Secretary, or stop at the Director's level. Does management include Washington, DC staff involved in program promulgation. Following OSM's logic, a permit applicant presumably benefits from the "services" such staff provide in establishing a program which later results in a permit.

The preamble (50 FR 7527, Col.3) leads WIDCO to believe OSM expects to recover these costs. Its example costs are noted as only including typical technical center costs, but presumably management, overhead and supervision extend to other work centers. WIDCO understands, from the proposed rule, that OSM expects to recover costs incurred at all of its centers.

The proposed rule suggests that review and approval of mining plans required under the Mineral Leasing Act are subject to full cost recapture. This presumably means that Bureau of Land Management (BLM) Resource Recovery and Protection Plan review costs are covered, since they are part of a 'mining plan'. In conversation with local office BLM staff, WIDCO understands that it is not clear if BLM plans to recover its costs. OSM needs to clarify the "Department's" intent here. And if the plan extends to local BLM offices, OSM needs to assess how much these services will add to the cost of permits.

Similarly, are other Department organizations, such as the Fish and Wildlife Service, aware of OSM's proposed fee process? Do these agencies have the accounting systems in place to identify costs?

WIDCO believes OSM has not answered these questions in its proposed rule because it simply doesn't know the answers. WIDCO suggests that the potential impacts of the proposed rule are undefined in the OSM proposal, and that a regulatory impact analysis is required in this case (see WIDCO comment to "Proposed Implementation Data").

Precisely for this reason, WIDCO contends that OSM's rulemaking is premature. No rational business entity will agree either in concept or practice to receiving a new service unless it knows what such "service" is buying and what the cost of that service will be. Generally, order of magnitude estimates such as OSM gives on pages 7527 and 28 of the register are low by anywhere from 50 to 100 percent. Thus potential costs for Western Surface mines could reasonably be projected to approach or exceed one-half million dollars possibly excluding indirects, overhead, and management. Similarly, the total cost of the proposed rule may well exceed the \$100 million figure triggering certain regulatory analysis requirements.

In summary, OSM needs to address these questions before proceeding with its proposed rulemaking, both as a matter of practicality and of law.

Issue 4 - What provisions should be made for small operators?

What rationale allows USM to suggest reduced fees (\$500) only for "small" operators (less than 100,000 tons per year)? Large tonnage mines, generally producing coal of lower quality than smaller, selective operators, operate on low per ton margins. Any new costs, such as those proposed in this rule, severely impact those margins. In fact, all coal operators are facing extreme business conditions and a severely depressed market. Moreover, if small operator fee costs are nominal, presumably USM would reallocate the burden of their indirect, supervisory, and management costs onto larger operations on the theory that they are better able to pay. If an operator produces four million tons a year, why should his fee not be limited to \$20,000 ( $4,000,000/100,000$ ) ( $\times$  \$500), instead of an open ended potential of hundreds of thousands of dollars. All parts of the industry are suffering. Perhaps small operators should have low limits on costs, but so also should larger operators. Finally, if USM does set reduced fees for small operators, then \$500 should be only for the smallest of the small.

Other issues raised by USM in its proposed rule are considered on succeeding pages.

PART 3

SPECIFIC ANALYSIS OF SUBSECTIONS OF THE PROPOSED RULE



Proposed Implementation DatePART 3

OSM proposes to bill applicants for OSM mining permits for all costs incurred after February 22, 1985 (the publication date of the rule) or some other date. Alternative effective dates include October 1, 1984, or thirty days after the rule becomes effective. Procedurally, the OSM may not charge for costs incurred prior to the time a rule becomes effective, regardless of OSM's previously stated intents. Without agreeing that a fee should be imposed, it may not be made retroactive to the date specific of a proposed or an enacted rule, if imposed.

OSM is governed by the Administrative Procedures Act, particularly 5 U.S.C. §553(d), which states that the required publication or service of a substantive rule shall be made not less than thirty (30) days before its effective date. The proposed rule relates to the assessment of fees for permit applications and other OSM activities. WIDCO believes that the assessment of fees in these circumstances is a substantive regulation. OSM is not required to adopt such regulation, but "may" do so at its discretion. See, 30 U.S.C. §1257(a) and 31 U.S.C. §9701(b). Without such a rule, apparently no fees would be charged. Under the statutes, the discretion exercisable by OSM can range from an amount equal to the actual or anticipated costs of reviewing, administering and enforcing a permit to some lesser amount. Id. There is no standard for determining the fee to be charged. The obligations imposed by the proposed regulation upon applicants or permittees comprise increased costs to the applicants or permittees and are likely to be significant from a financial standpoint, depending upon the final rule adopted by OSM. (This in and of itself

indicates that the proposed regulations are substantive in nature since they would impose an additional cost upon WIDCO.) To date, WIDCO has not known, and does not yet know the extent of liability it will ultimately face when a final rule is adopted. Clearly, Congress, in adopting the Administrative Procedure Act, did not contemplate that agencies would be able to adopt regulations imposing substantial liabilities and obligations upon parties based on activities of OSM over which the parties had no control and had no means to determine the extent of such liabilities and obligations. Therefore, WIDCO urges that any regulation which imposes fees upon applicants or permittees should be effective and apply to costs incurred on and after the effective date of the final rule, which can be no earlier than thirty (30) days following the publication of the final rule in the Federal Register. In this instance, the proposed regulations are not final and are not yet in effect.

The foregoing notwithstanding, WIDCO questions the propriety of imposing such fees at all. The owners of the Centralia coal mine acquired a majority of the property rights in the late 1950s and throughout the 1960s. The decision to construct the Centralia power plant was made in the late 1960s and was based, in part, upon the costs of producing coal from the Centralia coal mine. The owners of the Centralia coal mine, in turn, invested substantial monies and acquired equipment and constructed various coal facilities in the late 1960s, commencing mining operations in 1971. The Centralia coal mine has operated continuously since 1971, producing coal which is burned in the mine-mouth Centralia power plant. Those mining operations have been conducted pursuant to substantial regulation imposed by the State of Washington upon surface mining activities and involved

reclamation activities substantially similar to those now required under SMCRA. WIDCO and the purchasers of the coal produced by WIDCO have incurred and paid and are continuing to pay the full costs of reclamation. The extent of WIDCO's environmental activities were recognized by the Governor of the State of Washington when WIDCO received the State's Environmental Excellence Award in 1975.

Apparently, some operators of coal mines in the eastern part of the United States did not conduct their mining operations with the same environmental sensitivity as has WIDCO. The failure of such operators to reclaim the land in the eastern part of the United States led to the enactment of SMCRA, which is an expression of public policy and a declaration of public interest in the reclamation of lands impacted by the mining of coal. SMCRA is a pervasive regulatory act designed to protect the public interest. Under SMCRA, all coal mine operators are required to obtain a mining permit in order to continue to conduct mining operations. The issuance of a mining permit does not involve the granting of any special rights that are generally not available to the public such as a right-of-way across public land or the issuance of a mining lease on public land or the construction of a hydroelectric power project on navigable waters. The mining permit issued by OSM under SMCRA is simply the certification that the mining operations to be conducted by the operator are consistent with and in compliance with SMCRA and the OSM regulations adopted pursuant to SMCRA.

WIDCO will receive no "benefit" from OSM when WIDCO obtains a mining permit issued by OSM pursuant to SMCRA. WIDCO's mining operations will remain substantially the same as such mining operations have been conducted since

the beginning of operations in 1971. WIDCO will continue to reclaim the land that is affected by mining and protect the environment. The only effect of SMCRA and the issuance of a mining permit to WIDCO by OSM under SMCRA upon WIDCO and the mining operations in the Centralia coal mine is the imposition of substantial additional costs. Those costs include the costs of preparing an application to OSM for a mining permit and the costs involved with processing such application. Such costs are in addition to the "reclamation fees" of 35 cents per ton which are paid for each ton of coal produced and sold by WIDCO, which is a cost which ranges between 1.25 and 1.75 million dollars per year.

The issuance of a mining permit and the enforcement of such permit will not confer any benefit whatever to WIDCO. Rather, SMCRA and the OSM regulations and the enforcement of such regulations, including the processing and enforcement of a mining permit, is intended to benefit the public interest. OSM's costs incurred in connection with the processing of applications for mining permits and the enforcement of such mining permits are merely the costs of regulating the coal mining industry ostensibly for the protection of the public interest. Therefore, the fees proposed to be charged by OSM constitute an unlawful tax which cannot be imposed under SMCRA or the Independent Offices Appropriation Act. National Cable Television Ass'n., Inc. v. United States, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974). The fact that SMCRA constitutes a regulatory scheme intended to protect public interests is clearly expressed in the Act itself, 30 U.S.C. §1201.

Since there are no regulations in effect which specify how fees are to be determined by OSM for applicants and permittees under SMCRA, it is questionable that any fees could be charged at this time. See, Alyeska Pipeline Service Co. v. United States, 624 F.2d 1005 (Ct.Cl. 1980). In the Alyeska case, it is clear that Alyeska was obtaining a "benefit," since Alyeska was receiving a right-of-way across public land which is not generally available to the public. Yet, the Court of Claims determined that such a charge imposed by the government was unlawful.

Finally, WIDCO does not agree that the proposed regulation concerning fees is not a "major rule" as defined under the Executive Order No. 12291 dated February 17, 1981. Under §1(b)(2), the "major rule" is defined as "a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions...." WIDCO is the only large coal mining operation in the Pacific Northwest. Any fees charged by OSM will be passed on to the utilities purchasing the coal as part of the costs of producing the coal. Those utilities include four local governmental entities (the City of Seattle, the City of Tacoma, Public Utility District No. 1 of Snohomish County, and Public Utility District No. 1 of Grays Harbor). Any significant fee charged by OSM will constitute a "major increase in costs or prices for consumers, individual industries, local government agencies and a geographic region." Therefore, WIDCO believes that OSM should prepare a regulatory impact analysis and review as required by Executive Order No. 12291.

30CFR Part 701.12(a) - General RequirementsHardship Waivers (50 FR 7528, end of Col. 2)

OSM asks whether it should allow full or partial waiver of fees if undue hardship would result. WIDCO has noted throughout its comments that any fee will present varying degrees of hardship to all operators. Precisely for this reason there should only be a nominal fee, in one is imposed, for all operators. Otherwise, WIDCO believes that allowances for hardship will become a contentious issue. How will an agency predisposed to recovering all costs, and requiring an operator to prove the agency's costs are incorrect, be able to recognize a hardship?

Sections 701.12(a)(2) appears to allow waiver of fees (see above) only for small operators. If OSM is truly serious about dealing with hardships, its waiver provisions should extend to all coal mines.

30CFR Part 701.12(b) - Calculation and Billing of Fee

(See also WIDCO's comments above on Issues 2 and 3.) If a fee is imposed, WIDCO agrees with OSM's procedure for a nominal advance payment (\$1,500), followed by billing for other scheduled "services" after completion. However, if OSM is willing to provide a "service", then it should be able to more clearly define what that "service" is and project the level and cost of that "service" "up front". Moreover, the operator should be allowed to negotiate the level of "service" he is purchasing. As noted in other parts of these comments, WIDCO has been unable, to this point, to identify any real "service" or benefit provided by OSM.



WIDCO does not agree with OSM's definition of when a "service" is completed. WIDCO believes that this completion occurs only when OSM has taken an action such as permit approval and not at intermediate stages in the process. Perhaps this would encourage OSM to timely and expeditious completion of reviews.

30CFR Part 701.12(c)(1) - Payment Procedures - When Payment is Due

OSM's proposed requirement for payment within thirty (30) days of the billing date is unreasonable and unrealistic. Normal mail delays may mean an applicant would not see a bill for up to a week after billing, assuming OSM mails on the billing date. Most businesses operate on standard payment cycles. The bill may not be received "in cycle", and so payment could be delayed. Incidentally, does "pay within 30 days" mean OSM must receive payment within thirty (30) days or only that the applicant must only mail it within 30 days? The proposed rule is not clear on this point.

Sixty or ninety days is a more reasonable period, especially if an operator is confronted with a large bill and needs time to obtain the necessary funds. However, OSM also notes that it may withhold the sought after authorization until payment is received. This process has the potential for delaying permit actions for many months. Consider the following scenario:

On January 1 OSM completes its review process for a permit. The agency now begins to prepare a bill for services rendered. Gathering of accounting data from all affected offices takes 30 days, to February 1. The bill is then prepared, reviewed by OSM's accountants,

and sent to all affected agency offices for review. By the time all corrections are made and a bill is ready to mail, it is now (optimistically) March 15. The operator receives the bill by about April 1. Because the bill presents severe cash flow demands, he is unable to submit payment until sometime in May. OSM subsequently receives payment, records it, and authorizes a permit action. At a minimum, five months are likely to have elapsed.

Operators seeking permit modifications or amendments frequently do so on a time urgency basis. Artificially adding as much as one-half year to normal review times will create chaos in both the Industry and the Agency.

WIDCO understands OSM's desire to use the leverage implicit in payment before approval, but this process is going to create more problems than it solves. Perhaps OSM would issue a conditional permit (continued approval contingent on timely payment) based on a realistic assessment of the time scenario described above. Since OSM needs an incentive to process applications in a timely fashion, the fee should not be imposed earlier in the process to avoid the problems just described.

#### 30CFR Part 701.12(c)(2) - Installment Payments

In the preamble (50 FR 7529, Col.3), OSM appears to set forth a process whereby any operator may utilize an installment payment plan. However, the actual wording of the proposed rule only appears to apply to smaller mining operations (certain limits on fee cost as a percentage of capital or total reserves of less than one million tons). WIDCO believes that all operators should be able to utilize installment payments, and that OSM has erred in

proposing authority to deny an installment application. If any applicant requests payment in installments, OSM should be obliged to approve that request. If OSM elects to promulgate a rule with denial options, then it must first propose specifically what criteria it will use in approving or denying installment requests.

30CFR Part 701.12(c)(4) - Fee Non-refundable

"OSM tentatively has concluded that it is reasonable for the recipient of the service to bear these costs regardless of the outcome of the review and decision process" (50 FR 7530, Col.2, paragraph 4). This proposal is at least consistent with the rest of the proposed rule. Implementation is, however, likely to be contentious and fruitful ground for dispute. An operator seeking a new permit may lose a business opportunity if OSM does not expeditiously process an application. If OSM's delay caused the loss, why should the potential operator be further penalized by being charged for the delayed action?

30CFR Part 701.12(c)(5) - Failure to Pay

The preamble (50 FR 7530, Col.2,3) states that failure to pay would be a violation of the permit. If a violation can't be issued until a permit is in effect, and a permit can't be issued until payment is made, then failure to pay cannot be a violation since there is no permit. Perhaps OSM meant to address only payments due after a permit is issued.

30CFR Part 701.12(d) - Petition for Review

No rational businessman pays a disputed bill before resolving any dispute about the amount, type, or level of service included in the bill. OSM errs

in proposing contrariwise, especially considering subpart (d)(2) which puts the burden of proof on the payer and not the billing party.

If OSM submits a bill it is not likely later to conclude that its bill is incorrect, especially if it is under no obligation or burden to prove the reasonableness or validity of its charges. The deck is fully stacked against the operator, who does not have full or ready access to government accounting records. Moreover, since OSM may hire third party contractors to assist in its review, their records are even more remote and inaccessible to the operator. What does OSM expect to do if, having paid a third party, it is challenged on the reasonableness of those charges. Having already approved the charges, it is most unlikely that OSM will later conclude the charges are incorrect. In this instance the operator will have no recourse and will be facing a totally unwarranted burden of proof. WIDCO has recently been involved in an OSM third party review where one of the third parties essentially created a 'paper tennis match' which achieved little more than expensive delays. Per comments on §701(12)(b) above, is OSM proposing to let the operator negotiate the third party reviewers scope of work?

Incidentally, has OSM considered what impact the publication of its internal salary schedules on a person by person basis will have on its employees. If OSM is obliged to charge actual costs it must be prepared to fully document the costs of each affected employee included in a bill, as would any other organization conducting a similar activity.

WIDCO predicts that, as proposed, this part of the rule will result in appeal of every bill to the Office of Hearing and Appeals. But, since the bills presumably include all departments, and not just OSM charges, the bias for the Hearings officer will always be against the applicant. Moreover, since the appeal process itself may be considered a service associated with the applicant's proposed action, presumably he would eventually also be billed for the government's review of his appeal.

This proposal is, on its face, unrealistic and contentious and needs to be completely revised to put the burden of proof on the Department and not the petitioner.

#### 30CFR Part 140 - Federal Lands

When a Federal Program State applicant also has Federal Lands, as in WIDCO's case, OSM has not clarified whether one or two permit fees would be required. Presumably only one fee would be required. OSM is requested to address this question, and discuss how it proposes to keep from charging applicants twice for the same service.

Taken to its extreme, this section could be read to mean that a Federal Coal lease holder would be obliged to pay for the full cost of BLM's lease management costs, since those presumably tie to monitoring the approved mining plan. Is this OSM's intent?

#### 30CFR Part 146 - Review of Approval of Mining Plans

This section presumably refers to the Mining Plans required under the Mineral Leasing Act and again requires reimbursement to OSM for review of

any submitted modifications or changes. Consider the potential problems created by the following scenario:

An operator mining on a Federal lease updates, periodically, his drilling information and concludes that, for whatever reason, a change is justified in the estimated remaining coal reserves. Since the lease owner (BLM) requires disclosure of reserve data, the operator submits revised information to BLM. Perhaps the only change is a new definition of the location at which mining begins, and that location is inside previously projected disturbance lines. Will this data submitted to BLM also be required by OSM, and will it constitute a mining plan modification triggering a permit review? Common sense review of the data will frequently lead to a conclusion that the action is not significant. Still, the work leading to this conclusion may be considered a billable cost action. Would the operator be found in violation of the permit if actual coal recovery in the area occurred prior to payment?

This section will act as a disincentive to full and timely disclosure of information. Routine data transfer which now occurs both as a matter of courtesy and to keep the lease owner informed may tend to be withheld based on judgement calls as to whether it constitutes a modification.

Has OSM discussed Section 740 and 746 with the BLM to resolve potential conflicts prior to promulgating the rule? Since such conferences have not been addressed, WIDCO concludes the conversations have not occurred. Therefore, as for other instances cited, WIDCO concludes OSM is premature in proposing its rule at this time.



## Proposed Alternative Not Discussed by OSM - Threshold Cost Level

In its comments WIDCO has described a number of scenarios where small or relatively trivial changes to an OSM permit or BLM mining plan could result in cost charges and delayed decisions. Therefore it is suggested that, if a fee rule is imposed, a "threshold charge" be established. The threshold might be based on a minimum number of 'chargeable' man-days (say 20) or based on some minimum billable dollar amount. That is, work of less than the threshold level would result in no charge to the operator. Use of this provision would encourage the operator to discuss common or minor changes with the agency without feeling that a cost penalty would be imposed for these conversations.

PART 4

COPY OF WIDCO'S NOVEMBER 16, 1984 COMMENTS

TO THE

~~U.S.~~ GENERAL ACCOUNTING OFFICE

ON ITS STUDY REGARDING

PERMITTING FEES AND COSTS



Washington Irrigation & Development Co.  
1015 Big Hanaford Road  
Centralia, Washington 98531

November 16, 1984

Mr. J. Dexter Peach  
Director - Resources, Community  
and Economic Development Division  
U. S. General Accounting Office  
Room 4915 - GAO Building  
441 G Street NW  
Washington, D.C. 20548

Dear Mr. Peach:

RE: "DRAFT OF A PROPOSED REPORT - The Interior Department's  
Office of Surface Mining Should More Fully Recover or  
Eliminate Costs of Regulating Coal Mining."

Washington Irrigation and Development Company (WIDCO) appreciates this opportunity to comment on the above referenced report, which was transmitted to us by representatives of several industry trade associations. WIDCO has followed the subject of Office of Surface Mining (OSM) fees with some interest for reasons stated below. Our staff was interviewed by several members of the GAO staff about a year ago during early data gathering stages of your project. In our conversations with Mr. David Davis and Ms. Donna Lucas we spoke at some length about the potential impacts of OSM fees on WIDCO's operations. Since our observations were at some variance with conclusions GAO has drawn about the impact of fees on the industry, we feel obliged to comment on your draft.

WIDCO, the largest coal producer in the Pacific Northwest, is a subsidiary of a major utility serving that region, The Washington Water Power Company. WIDCO's 670 employees will produce approximately 3.8 million tons of clean coal at the Centralia Mine in 1984 as fuel for the adjacent Centralia Steam-Electric Generating Plant.

The Centralia Steam-Electric Plant is owned and operated by eight northwest utilities: Pacific Power and Light Company; The Washington Water Power Company; Puget Sound Power and Light Company; Portland General Electric Company; Seattle City Light; City of Tacoma; Snohomish County Public Utility District No. 1; and Grays Harbor Public Utility District No. 1. The electric power generated at Centralia is distributed to households and industries throughout the Northwest. WIDCO is thus an important part of the Pacific Northwest community, and new regulations and costs profoundly affect not only its employees but many residents in the region.

Washington State is one of the two producing states where the Office of Surface Mining has established a Federal Program to regulate surface coal mining. WIDCO is currently obtaining a Surface Mining Control and Reclamation Act (SMCRA) permit. Thus our operation could be expected to be substantially impacted by any OSM regulations imposing increased regulatory fees. Since any fees established are certain to be impacted by GAO recommendations, your final report will directly affect our cost of doing business.

WIDCO does not wish, at this time, to comment on the principle of allocation of at least some regulatory fees to the so-called beneficiaries of services received from a federal regulatory agency. We are sensitive to directions established by the President in this regard. Questions about the percentage of an agencies' costs which must be passed through to the affected industry, as opposed to those paid out of general tax revenues for the public good, can be addressed later through other vehicles.

Similarly, WIDCO does not wish at this time to dispute GAO's calculations of the costs of various components of OSM's regulatory program, or the potential allocation of those costs. There is simply insufficient data in the draft to allow analysis of your numbers. It does seem to us that the draft report presents a simplistic summary of these costs, particularly for Federal Program states. We are interested in your statements (see for example the last paragraph of page 32) about GAO analysis of regulatory costs on a State by State basis for fiscal year 1984. We believe such analyses, as well as the other cost details, should be made available for public review, so that GAO's calculations can be scrutinized.

Another example of the detail which apparently exists, but which is absent in the report, is noted on page 36 " - - - we made certain adjustments. In two states, we took into account that high start-up costs for new programs had temporarily inflated costs; we based our estimates on regulatory costs of a neighboring state. - - - " Since Washington State has a new program, the statement could apply to our State. Again, WIDCO would like to review GAO's analyses.

Chapter Five in the draft report requires response, since we believe it includes erroneous assumptions and conclusions. It is clear that GAO's conclusions are captured in the title "Full Cost Recovery would have Little Impact on the Coal Industry". As we read the arguments they seem to say:

- (1) Increased costs won't affect national coal production
- (2) Increased costs have minimum impact within States
- (3) Industry Officials see little impact if fees are imposed to recapture regulatory costs.

WIDCO spoke with your staff during preparation of the study. The assessment of projected impacts which we conveyed to your staff is diametrically opposite to the arguments presented above. Increased costs do impact our coal production. We suspect our analysis applies at least in part to many other industry members. Regarding the points above:

- (1) WIDCO produces coal for a power plant which is in direct competition with other sources of electricity, including hydro and thermal power generated in the Northwest, and imported from Western Canada. It is a fact that increased costs of coal to the power plant directly translate into increased generation costs. It is a fact that the power plant is operating below capacity because other sources of power have lower costs. The direct result of this is reflected in the following annual mine production. All of WIDCO's coal was sold to the adjacent plant.

| <u>YEAR</u> | <u>ANNUAL PRODUCTION</u> |
|-------------|--------------------------|
| 1981        | 4,635,000                |
| 1982        | 4,161,000                |
| 1983        | 3,884,000                |
| 1984        | 3,817,000 (projected)    |

Increased costs result in lower mine production. WIDCO's production losses are not offset by increased coal production in other regions of the nation. We are confident that similar situations exist in other areas.

Additionally, as costs increase WIDCO expects to find itself increasingly in competition with foreign sources of coal, particularly from Western Canada. If WIDCO should lose market to non-U.S. sources, national coal production would most certainly be affected. Other U.S. producers can expect to be similarly impacted. U.S. Steam Coal consumption is increasingly impacted by overseas suppliers (as for example recent sales by Columbia to U.S. utilities).

GAO's conclusions are not supportable by facts.

- (2) Regarding argument two above, increased costs most certainly will have an impact within at least one state. At issue is the amount of coal to be produced by this sole source mine over the next several decades. Since the level of WIDCO's costs will affect power plant demands for coal, the State of Washington could be directly affected by reduced mine and power plant production. Such losses may directly translate into reduced state and local tax revenues, decreased employment, and reduced requirements for services and supplies provided by support industries and firms.

Incidentally, WIDCO produces coal from a combination of private and federal coal leases. Reductions in annual production directly translate into reduced levels of Federal coal production. The immediate effect is a reduction in Federal royalty revenues on that production.

- (3) Regarding GAO's third point, at least one industry member can project possibly substantial impacts if fees are imposed. GAO's simplistic assumption about the impact of pass through costs (see page 34) misses the point about the eventual impact of those costs. They pass through, ultimately, to the consuming public. Surely GAO understands public concerns about increased costs of power. Allocation of power demand between coal fired and other plants doesn't just offset costs. Eventually, the consumer pays more.

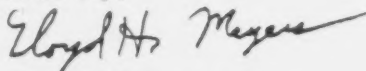
Moreover, because utility companies may not be able to fully recover increased costs in rate-making proceedings, the financial health of those utilities may be severely impacted. Both the rate payer and the utility shareholder suffer in this situation.



"Significance" (page 34, paragraph 2) like beauty is relative to the eyes of the beholder. Proposed OSM fees can be expected to have significant impact. We hope that this letter has assisted you in understanding why GAO needs to further consider its analyses about lack of significance before drawing conclusions and making recommendations regarding the subject of OSM fee costs.

Thank you for giving us this opportunity to comment on your draft conclusion. Please don't hesitate to contact us directly if we can further assist you in your studies.

Sincerely,



Lloyd H. Meyers  
Vice President and General Manager

amt

cc: John Ward, Director, Office of Surface Mining

bcc: L. Zell, Mining and Reclamation Council  
R. W. Long, American Mining Congress  
P. Redmond, TWPCO  
J. Harvey, TWPCO

Senator ROCKEFELLER [presiding]. Mr. Studer.

**STATEMENT OF JAMES K. STUDER, PRESIDENT, FACTS ABOUT  
COAL IN TENNESSEE**

Mr. STUDER. My name is Jim Studer. I'm appearing today as president of Facts About Coal in Tennessee, Tennessee's Coal Association.

The association is composed of 35 operator members which represent approximately 70 percent of the annual coal production in Tennessee. I would like to point out that while my testimony will probably seem a little repetitious, we do have a unique situation in Tennessee in that we've had it both ways. And now we are under OSM's jurisdiction.

The Tennessee coal industry strongly opposes OSM's proposed rule for charging coal mine operators, through permit application fees, the full and actual costs associated with OSM's review and administration of permit applications and other specified regulations.

First, the Surface Mining Control and Reclamation Act, by its express terms, restricts and regulates private use of privately owned property for the public benefit. The full and substantial cost of compliance with SMCRA for the public benefit is placed upon the mining industry.

However, since this regulation is for the public benefit, we wish to reiterate that the cost of administering the regulation at the very least should be borne by the public.

Second, the proposed OSM fees strongly discriminate against the Tennessee coal industry. The State of Tennessee was given primacy to regulate surface coal mining in Tennessee in August 1982. Through no fault of the Tennessee, OSM because of dissatisfaction with the State of Tennessee regulatory authority, assumed responsibility for inspection and enforcement in Tennessee in May 1984, and eliminated State regulation and assumed entire responsibility for regulation of the coal mining industry in Tennessee on October 1, 1984.

Tennessee is the only Appalachian coal State subject to OSM's primary regulation. Therefore, Tennessee would be the only Appalachian coal State subject to the proposed OSM permit fees rule. This rule would single out the Tennessee coal industry to make it responsible through permit application fees for the full cost of certain specified regulation. The amount would be unspecified, unpredictable, open-ended, beyond the miners' control and dependent upon the level of regulation which OSM decided to impose.

The proposed rule even suggests that it be applied only in Tennessee and on Indian lands, retroactive to October 1, 1984. This would be unfair to the Tennessee coal industry and would place it at a competitive disadvantage.

Third, it is grossly unfair to make the permit applicant responsible for undetermined and undeterminable open-ended costs over which the miner has no control. Yet, this is precisely what the proposed OSM rule would do. This is made clear in the proposed rule itself which states—and I quote: "It is impossible to predict in advance what cost items might be involved in providing a particular covered service, but OSM intends to recoup, to the maximum

extent permitted by law, all of the actual costs, both direct and indirect, incurred by the Department in providing each covered service."

The level of OSM regulation may likewise depend in large part upon citizen group complaints or involvement which frequently are without merit. It is particularly inappropriate to charge the miner for the Government's cost associated with citizen group participation in regulatory process. Obviously, OSM's proposed permit application fees would be an unpredictable cost upon which reasonable decisions could not be made.

We submit that a business cannot reasonably plan and function with type of unknown.

Fourth, the Tennessee coal industry simply cannot accept OSM's regulation or over-regulation. OSM now has in Knoxville some 135 employees to regulate less than 90 active mining sites in Tennessee. Tennessee's coal production in 1984 was 7.1 million tons, down from 10.5 million tons in 1981. Tennessee's production is minuscule compared to neighboring Kentucky and other Appalachian coal States.

Many single companies in neighboring Kentucky produce more coal than is produced in the entire State of Tennessee, yet OSM's regulation in Tennessee is at a much higher level than is found in other neighboring Appalachian States.

This over-regulation, the cost of which is making Tennessee's coal noncompetitive, is largely responsible for the 30-percent reduction in Tennessee's coal production in 3 years.

OSM's proposed rule, making the Tennessee miner responsible for permit application fees for the cost of much of his own regulation, would be a further nail in the coffin of the Tennessee coal industry.

Finally, we believe OSM's proposed rule is regressive and discriminates against small operators and small mines. Review of a permit application for a small mine will involve approximately the same as the same service for a large mine, yet the smaller production will not justify the charge. This is of particular concern in Tennessee, where a substantial portion of the production is from small mines.

While the proposed rule makes special provisions for operators whose annual production is less than 100,000 tons, it makes no provision for small mines. It also makes no provision for small operators whose total production is more than 100,000 tons but still very small in comparison with large operators.

We believe this is unfair and violates the legislative intent of SMCRA to not discriminate against small operators and small mines.

We appreciate very much this opportunity to appear, and sincerely hope that action will be taken to prevent implementation of the proposed OSM rule.

[The prepared statement of Mr. Studer follows:]

TESTIMONY OF JAMES K. STUDER, PRESIDENT  
FACTS ABOUT COAL IN TENNESSEE  
TENNESSEE COAL INDUSTRY ASSOCIATION

SENATE SUBCOMMITTEE ON NATURAL RESOURCES  
DEVELOPMENT AND PRODUCTION

July 9, 1985

Good day. My name is James K. Studer. I am appearing today as president of Facts About Coal in Tennessee, Tennessee's coal association. The Association is composed of 35 operator members, which represent approximately 70% of the annual coal production in Tennessee.

The Tennessee coal industry strongly opposes OSM's proposed rule for charging the coal mine operators, through permit application fees, the full and actual cost associated with OSM's review and administration of permit applications and other specified regulation.

First, the Surface Mining Control and Reclamation Act (SMCRA), by its express terms, restricts and regulates private use of privately owned property for the public benefit. The full and substantial cost of compliance with SMCRA for the public benefit is placed upon the mining industry. However, since this regulation is for the public benefit, the cost of administering the regulation, at the very least, should be borne by the public. This is not inconsistent with SMCRA, since section 507(a) of SMCRA allows the state or federal regulatory authority to charge a fee less than the actual or anticipated cost of reviewing, administering, and enforcing a permit. To our knowledge, the practice of essentially all state regulatory authorities is to charge a small

administrative fee for permit applications. This should likewise be the rule of OSM.

This brings us to our second point. The proposed OSM fees strongly discriminate against the Tennessee coal industry. The State of Tennessee was given primacy to regulate surface coal mining in Tennessee in August 1982. Under Tennessee's approved program, a permit application fee of \$250 for each year of the permit and \$25 per acre of the surface to be affected and permitted was charged. Through no fault of the Tennessee coal industry, OSM, because of dissatisfaction with the State of Tennessee regulatory authority, assumed responsibility for inspection and enforcement in Tennessee in May 1984, and eliminated state regulation and assumed entire responsibility for regulation of the coal mining industry in Tennessee on October 1, 1984. Tennessee is the only Appalachian coal state subject to OSM's primary regulation. Therefore, Tennessee would be the only Appalachian coal state subject to the proposed OSM permit fees rule. This rule would single out the Tennessee coal industry to make it responsible through permit application fees for the full cost of certain specified regulation. The amount would be unspecified, unpredictable, open-ended, beyond the miner's control, and dependent upon the level of regulation which OSM decided to impose. The proposed rule even suggests that it be applied, only in Tennessee and on Indian lands, retroactive to October 1, 1984. This would be unfair to the Tennessee coal industry and would place it at a competitive disadvantage.

Third, it is grossly unfair to make the permit applicant responsible for undetermined and undeterminable open-ended costs over which the miner has no control. Yet this is precisely what the proposed OSM rule would do. This is made clear in the proposed rule itself which states: "It is impossible to predict in advance precisely what cost items might be involved in providing a particular covered service...(but) OSM intends to recoup, to the maximum extent permitted by law, all of the actual costs both direct and indirect, incurred by the Department in providing each covered service." The level of OSM regulation may likewise depend in large part upon citizen group complaints or involvement, which frequently are without merit. It is particularly inappropriate to charge the miner for the Government's costs associated with citizen group participation in the regulatory process. Obviously, OSM's proposed permit application fees would be an unpredictable cost upon which reasonable decisions could not be made. We submit that a business cannot reasonably plan and function with this type of unknown.

Fourth, the Tennessee coal industry simply cannot afford OSM's regulation or overregulation. OSM now has in Knoxville some 135 employees to regulate less than 90 active mining sites in Tennessee. Therefore, by submitting a permit application, the miner would become responsible, not only for compliance, but for the costs associated with whatever level of regulation OSM



chooses to impose. Tennessee's coal production in 1984 was 7.1 million tons down from 10.5 million tons in 1981. Tennessee's production is minuscule compared to neighboring Kentucky and other Appalachian coal states. Many single companies in neighboring Kentucky produce more coal than is produced in the entire State of Tennessee. Yet, OSM's regulation in Tennessee is at a much higher level than is found in Kentucky and other neighboring Appalachian states. This overregulation, the cost of which is making Tennessee's coal noncompetitive, is largely responsible for the 30% reduction in Tennessee's coal production in three years. OSM's proposed rule, making the Tennessee miner responsible through permit application fees for the cost of much of his own regulation, would be a further nail in the coffin of the Tennessee coal industry.

Finally, we believe OSM's proposed rule is regressive and discriminates against small operators and small mines. Review of a permit application for a small mine will involve approximately the same cost as the same service for a large mine. Yet, the smaller production will not justify the charge. This is of particular concern in Tennessee where a substantial portion of the production is from small mines. While the proposed rule makes special provisions for operators whose annual production is less than 100,000 tons, it makes no provision for small mines. It also makes no provision for small operators whose total produc-

tion is more than 100,000 tons but still very small in comparison with the large operators. We believe this is unfair and violates the legislative intent of SMCRA to not discriminate against small operators and small mines.

We appreciate very much this opportunity to appear and sincerely hope that action will be taken to prevent implementation of the proposed OSM rule.

Senator ROCKEFELLER. Thank you, Mr. Studer.  
Mr. Neill.

**STATEMENT OF AUTHUR K. NEILL, VICE PRESIDENT, WYOMING/  
MONTANA OPERATIONS, WESTERN ENERGY CO.**

Mr. NEILL. Thank you, Senator. I'd like to summarize, if that's all right, and just touch on three points that I think are worth touching on out of my testimony.

The first one is the implication that under this proposal, OSM could collect for the fees of all agencies involved in the permit review process. And, frankly, that's very scary to us. When I think about the agencies now involved in permit review, in our case out West, Bureau Plan Management, Office of Surface Mining, Fish and Wildlife, and EPA becomes involved. They would have authority for fee collection, but there would be no budgetary restraint or constraint on what they could, do the time they could spend, and the fees they would charge.

And that brings me to the second point that I would like to bring out. I think the OSM and GAO have grossly underestimated the costs of the Government involvement in the permitting review process. And I took a rough stab at it, and I believe that out West at least, \$400,000 is probably a conservative estimate of what it would cost us, the operators, if we were to be charged for all of the Government activity involved in our permitting process.

And also I believe that because of the opportunity for citizen involvement in the permitting process, the fact that in some areas or some States, there is more of that than in other States, and the Federal Government must react to those requests for involvement, that you'll find a great variation in the time spent by the agencies on permit review, and therefore you'll find terrific inequities in the costs to the operators of that involvement, depending on where the mine happens to be located.

And finally, it's been our experience operating in the three States that we do—and that's Montana, Wyoming, and Texas—that the review time can vary terrifically between States. In our case, it can be as much as 12 months between Montana and Wyoming, for instance, or Montana and Texas. And that has to do with differing mining conditions, attitudes, and different programs, both on the State, but also on the Federal level. And, again, trying to build companies with actual costs of the permit review has to take into account that the time is going to be different in Wyoming than Montana or Texas, as an example.

Again, there won't be any way to equally spread the costs of permit review to the operators requesting the permits.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Neill follows:]

Statement

Author K. Neill  
Vice President  
WESTERN ENERGY COMPANY

Oversight Hearing on Proposals  
for Cost Recovery of Administering  
of the Surface Mining Program

Subcommittee on Natural Resources  
Development and Production  
Committee on Energy and Natural Resources

Good morning. I appreciate the opportunity to appear before the Subcommittee regarding the Office of Surface Mining's (OSM) proposed rulemaking on the collection of permit application fees and the recent General Accounting Office report on the same subject. My name is Arthur K. Neill, and I am the Vice President of Montana/Wyoming Operations for Western Energy Company. Western Energy and its subsidiary operate surface coal mines in Montana, Wyoming and Texas. Last year we produced nearly 12,000,000 tons of coal.

I am here primarily because we are concerned about the proposed rulemaking to collect fees for permit review and other activities. This will be another cost added to those of an already overburdened industry. We have seen so many federal programs and actions add unnecessarily to the cost of producing coal. Royalties on federal coal have increased ten fold. We are already funding black lung benefits programs and abandoned mine reclamation programs -- conditions for which we in the West have had little responsibility. Imported coal is making greater inroads -- particularly in the Gulf Coast area -- an area that should be within the natural market reach of domestic coal. Permitting fees added to the costs that we already face further depress an already depressed industry making it harder to compete with imports and other energy sources.

OSM apparently uses, as the basis for proposing their rule, the belief that coal producers are "beneficiaries" of the Surface Mining Act and therefore subject to the collection of users fees. While the principle of recovering costs from the beneficiary of the activity may have valid

applications, it is inappropriate in this case. We do not believe that we "benefit" from SMCRA. Producers did not band together and lobby Congress to pass the Act. Quite the opposite is the case. Clearly the public, and not the producers, benefits from the Act. In its preamble to the proposed rules, OSM takes a position that inspection and enforcement provide a direct benefit to the coal mine operator. This is done in spite of the stated recognition that the true intent of this process is to, among other things, "protect the health and safety of the public." In those states where a cooperative agreement exists, the state regulatory authority has the primary responsibility for inspection and enforcement. OSM provides an oversight function as mandated by SMCRA. The sole intent of this function is to provide assurance to Congress and the public that the objectives of SMCRA are being met. The responsibility for regulation should not be duplicated nor should operators twice bear the cost for the same function.

The proposal also states that operators would bear the costs of other agencies within and without the Department of Interior who became involved with the permit review process. It seems that there might be no limit to the number of agencies that could become involved and the cost of their efforts. There would be authority for fee collection but no budget restraint on their activities. Quite the contrary, it would be an inducement to build staff and increase the cost and the size of government. Additionally, the opportunity for citizen involvement in the permitting and enforcement process greatly adds to the cost. Some citizen involvement is unwarranted and not justified, yet under this proposal the operators would bear the cost of the additional effort



required by the agencies to deal with the complaints. In effect, operators would pay the cost of efforts opposing their operations. In areas where opposition is strong, those operators face an unfair cost burden.

It has been our experience, in the three states we have operations, that permit review times vary at both the state and federal level. There can be as much as twelve months variation. This is due primarily to differing programs, attitudes and mining conditions. Nonetheless, operators in those areas where lengthy permit reviews are common, face an additional cost not experienced by other areas. Because of geological circumstances, some coal producing areas will be penalized by the requirement that the actual fees for permit review be charged to the operators. If fee collection is inevitable, and we certainly hope that it is not, the only way to eliminate this inequity, and the many others, would be the adoption of some type of "flat" fee system. It should somehow be related to the size of the reserve block or mine for which a permit is being requested or based on some reasonable average or appropriate cost.

OSM suggests that if fee collection is adopted that costs will be collected retroactively. That position is quite arbitrary and would be extremely unfair to those operators charged for OSM's past activities. The regulatory programs established by SMCRA have not run smoothly, nor efficiently, and they have not been cost effective. OSM admits that they do not have a detailed accounting system to monitor the costs that would be charged to operators. It is not reasonable to charge operators for costs generated under such a system -- either now or retroactively.

Finally, the fees that OSM is proposing to charge operators will be much higher than they suggest. Our industry cannot absorb additional costs. Mine closures are being announced and other operators are in serious financial trouble. The proposal is premature; costs cannot be accounted for; and, the suggested rules clearly go beyond the intent of the law.

Thank you for hearing Western Energy's concerns on this issue.

DG/#02088

Senator ROCKEFELLER. Thank you, gentlemen.

I might just ask one question, Mr. Studer, of you if I could. It's not quite clear to me as I read over some of the material, why it is that Tennessee is in a different category on all of this. Not on all of this, but that you do not have this State/Federal relationship, this primacy relationship.

Why is that? There's plenty of coal mining in Tennessee.

Mr. STUDER. Well, the reason that we have a different situation is that the State lost primacy.

Senator ROCKEFELLER. Is that on a temporary basis? Are you not anticipating that to come back to the State? Do you not want it back, or what?

Mr. STUDER. We would hope that it would come back under the right circumstances, yes.

Senator ROCKEFELLER. And what does that mean?

Mr. STUDER. Obviously, we would like for it to come back to the State and be run as a State program. It was OSM's opinion that the State was not running the program properly at the time.

Our biggest problem, while we're not saying that we're in a period of bliss right now with OSM, it is far better now in that we're operating under one regulatory authority, rather than two.

Senator ROCKEFELLER. Is it the State of Tennessee's objective to return primacy to Tennessee?

Mr. STUDER. Yes.

Senator ROCKEFELLER. Gentlemen, I thank you very much. I apologize that you had to wait so long, but such is the nature, I guess, of hearings.

Chairman Warner wants me to announce that the record will be held open for another 2 weeks for any other Senators or others who wish to enter comments on all of this, and with that we will adjourn the hearing.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]

## APPENDIXES

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### APPENDIX I

#### RESPONSES TO ADDITIONAL COMMITTEE QUESTIONS

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RESOURCES, COMMUNITY  
AND ECONOMIC DEVELOPMENT  
DIVISION

UNITED STATES GENERAL ACCOUNTING OFFICE  
WASHINGTON, D.C. 20548

AUG 15 1985

The Honorable John W. Warner  
Chairman, Subcommittee on  
Natural Resources Development  
and Production  
Committee on Energy and Natural  
Resources  
United States Senate

Dear Mr. Chairman:

In regard to your July 11, 1985, letter enclosed are responses to questions developed by your subcommittee subsequent to your July 9, hearing on the Office of Surface Mining's proposed rulemaking to collect permit application fees.

Sincerely,

*Michael Gryszkiewicz*

Michael Gryszkiewicz  
Associate Director

Enclosures

(213)

QUESTIONS FROM JOHN W. WARNER, CHAIRMAN,  
SUBCOMMITTEE ON NATURAL RESOURCES DEVELOPMENT  
AND PRODUCTION, SENATE COMMITTEE ON ENERGY  
AND NATURAL RESOURCES AND GAO RESPONSES

Question

It appears that financing the regulatory program through permit fees would require the coal market to remain relatively fixed, since if the number of permits were to decline, the cost of permits would need to increase. It would seem difficult at best for states to operate a regulatory program without more accurate budget projections. Have you accounted for this and how would you suggest overcoming this concern?

GAO response

Our analysis of passing regulatory costs through to coal operators in the form of permit fees shows that there would be no effect on overall coal production or demand. Therefore, coal production will not remain fixed but should continue to grow as anticipated to over one billion tons by 1990. As a result, recovering regulatory costs should not result in a decline in the number of coal mining permits.

If the number of permits decline within a state, however, it is possible that the cost of each permit might increase since there are certain fixed overhead costs associated with running a regulatory program.

As for your concern that the states would have a difficult time operating a regulatory program without more accurate budget projections, the Office of Surface Mining (OSM) already requires each state with a regulatory program to submit estimates of its regulatory costs. Because of this requirement, the states already have methods of estimating their permitting costs. These estimates are used by OSM to determine the size of state grants for developing, administering, and enforcing coal permits on state and private lands. The cooperative agreement states also must provide estimates to OSM of their costs to process permit application and enforcement permits on federal lands.

Question

By GAO's modeling of potential production impacts, only PA is indicated as statistically significant. Whether statistically significant or not, the fact remains that GAO's numbers reflect a total displacement of 3.81 million tons of coal production by 1990.

Has GAO considered the full range of both the direct and indirect costs and ramifications of this and not of the coal industry but the ancilliary industries. For example, employment, lost local tax revenues, capital equipment losses, etc.

GAO response

We considered the full range of direct and indirect costs in our cost recovery analysis. However, we did not attempt to estimate any tertiary effects such as on ancilliary industries or unemployment. Our modeling of potential production impacts shows that both Pennsylvania's and West Virginia's production would change by 1990. Pennsylvania would lose about 1.5 million tons to West Virginia. The other tonnage difference noted in Table 5 on page 28 of the report are not statistically significant numbers since the DOE/EIA model is not sensitive to changes of less than 1 million tons. These differences could as easily be zero, or any positive or negative number less than 1 million tons. Therefore, the total displacement of coal, which can be predicted from the model, is 1.5 million tons by 1990.

Question

GAO states that increases up to 40¢ per ton would not affect coal demand or production overall, according to EIA staff. They used the explanation that 80% of coal is used for electricity generation by utilities and that costs would need to rise \$5 before a change in coal demand would occur. Did GAO consider the effect of the 40¢ cost increase in the sectors which consume the additional 20%?

GAO response

We considered the effect on coal demand that a 3 to 40 cents a ton price increase would have on all consumers, including coal-fired power plants which use about 80 percent of the coal produced in the United States. The prices of other alternative fuels are expected to increase more rapidly than coal throughout the projected period even if a 40 cents per ton increase is added to the price of coal. Therefore, the demand by all consumers--coal-fired power plants, the industrial sector, and the residential sector--should not change.

Question

GAO has mentioned that numerous states have warned that primacy may be forfeited if full cost recovery permit fees are initiated. Has GAO looked at the cost implications of OSM program takeover, i.e., are programs implemented by OSM more costly than state run programs? If so, and given the fact that several



forfeitures are now contemplated, it seems that GAO's cost figures and therefore production figures could be far from reality.

#### GAO response

Data obtained during our review showed that OSM's costs to run a regulatory program are not significantly greater than the states' costs. However, we did not verify the accuracy of OSM or states' cost data. Since we did not analyze the effect of cost recovery with OSM as the regulatory authority in states that now have primacy, we do not know the effect on production this could have if OSM took over the state programs. However, since the data we received shows small differences in costs between OSM and the states, we believe that there would not be a significant effect on coal production.

#### Question

GAO states that full cost recovery is the method it advocates through permit fees. This would necessitate an elaborate "accounting" mechanism to be implemented, i.e., OSM or state employees would need to track time spent on each case, log it, explain it, etc. It would also require independent audits to make sure all the facts and figures add up. Did GAO consider the time and costs of these processes? It appears they must not have since they had previous financial data which did not have such programs. It seems this would increase the cost of production beyond the current GAO estimates whereby changing production figures also. It also may necessitate new employees specifically qualified as accountants. Are such costs to be passed on to operators?

#### GAO response

Our review did not include an estimate of the time and costs of implementing an accounting mechanism to recover permit fees. However, we do not believe an "elaborate" system is needed. For example, Office of Surface Mining employees generally record their time to certain areas based on the agencies accounting system. Therefore, an employee's time spent on processing a permit would require only an additional accounting code not additional time. Also, most coal producing states already have experienced staff and existing accounting systems in place that could be used to recover regulatory costs such as the systems states presently use to estimate their costs in applying for the annual state regulatory grants. Therefore, the increase in the overall program costs should be slight. Any increased costs should be passed on to the coal operators since they are the beneficiaries of the permit.

Question

GAO believes that OSM permits grant coal operators a special privilege--permission to mine--and are therefore the primary beneficiaries and should pay in full for OSM costs. Is it not true that the actual right to mine is inherent to a person who owns the mineral rights and that the only thing the permit does is set conditions such that mining is carried out in the least environmentally damaging manner, i.e., the public is the primary beneficiary not secondary.

GAO response

We believe that the right to mine is granted by OSM through a coal permit and that the ownership of mineral rights is a property right which does not give an owner the right to mine. Furthermore, the Surface Mining Act requires a permit fee and authorizes the regulatory authority to recover up to the full costs of reviewing, administering, and enforcing a permit. We believe OSM should fully recover its costs for these activities by charging coal operators a fee, rather than assigning the costs to federal taxpayers. In a series of decisions, the courts have found that public benefit does not argue against the recovery of costs from members of regulated industries when the services provided are necessary to a company's operation.

Question

Given the precedent setting nature of this attempt, is it GAO's view that EPA, for example, recover all its costs for its permitting authority under the CAA and CWA? If this is contemplated, the costs to all industries, cumulatively would be enormous.

GAO response

Our review did not include an evaluation of EPA's authority to recover its costs for permits under the Clean Air Act and Clean Water Act and therefore we cannot provide an opinion at this time.

Question

Putting this question of beneficiaries aside, GAO states that it believes assessing costs against beneficiaries rather than taxpayers in general promotes efficiency and economy in government operations. On what is this statement based? It seems that the system advocated by GAO would induce rather than reduce inefficiency, i.e., self perpetuating nature of the proposal.

GAO response

User charges for publicly provided goods and service are, in principle, desirable for several reasons. They are equitable because they place the cost burden of publicly produced goods and services on the recipients. They also act as a market test for costly products, which ensures that products are not made whose costs exceed their benefits. User charges are also a source of revenue that can lighten the burden on taxpayers. Finally, pricing products provided by the Government contributes to a more efficient allocation of these products, as well as the productive resources shared by the public and private sectors.

Question

GAO believes that much of the costs will be borne by the consumers ultimately. Since nearly every person in the United States either consumes electricity directly or at least consumes or uses products which used electricity in its production, is it not safe to assume that the "taxpayer/citizen" will pay in either event?

In fact, unless "taxpayers" are going to be reimbursed for the money "saved" through charging permit fees, the "taxpayer" may be faced to pay twice for the same "benefit."

Does this scenario conform with the true intent of this administration which has been to reduce the size of government and to put more money, not less, in the public's hands?

GAO response

We believe that by assessing regulatory costs through the cost of coal, consumers will pay in proportion to their direct or indirect use of coal. Whereas recovering coal regulatory costs through taxes means that all taxpayers share the burden equally even if their indirect useage of coal is lower or higher than the average. As for the concern about reducing the size of government, cost recovery has no direct relationship with either increasing or decreasing the size of government.

Question

GAO states that if state grants are eliminated, states can recover costs either by permit fees or by transfer of other revenues.

Given the "average" grant amounts to nearly \$1.5 million, what is the likelihood that this amount will be transferred from other sources other than an increased fee?

Has GAO looked at the reality or feasibility of such transfers?

GAO response

We maintain that states can recover regulatory costs through permit fees or finance their regulatory activities using general revenues. We found that most states are presently using state revenues in addition to permit fees, to support their regulatory programs. However, we did not examine the likelihood of states financing these increased costs from sources other than an increased fee.

QUESTIONS FROM SENATOR DALE BUMPERS  
AND GAO RESPONSES

Question

In your report you make the assumption that most costs to the coal operators would be passed on to the consumer. What would happen in cases where the operators do not have contracts with their customers that allow them to pass on such costs?

GAO response

If operators are charged permit fees that fully recover regulatory costs and they do not pass these costs along to the consumer, they might be adversely impacted. However, OSM's proposed regulations ask for comments on two ways that adverse impact could be mitigated. The first provision is to have a small fee of only \$500 for small operators. The second would be a so-called "hardship" provision. This regulation would allow a reduced permit fee to any operator who would be severely impacted after providing their case to OSM. The states could also assist adversely impacted operators if they choose to recover regulatory costs through permit fees.

Question

Did GAO do a costs analysis of the impact of imposing a "special tax" on coal operators to offset regulatory support cases? If so, what were the results of this analysis?

GAO response

We did analyze the impact of imposing a flat fee per ton of coal equally on all coal operators. The flat fee was 3.5 cents per ton over the costs calculated for each state, and it had no effect on coal demand or production overall.

Question

Would this tax be levied as a flat percentage of coal production by the operator?

GAO response

We do not know how the Office of Surface Mining would levy this tax, if such a tax was approved by the Congress.



## United States Department of the Interior

OFFICE OF SURFACE MINING

Reclamation and Enforcement

WASHINGTON, D.C. 20240

OCT 7 1985

Honorable John W. Warner  
Chairman, Subcommittee on Natural  
Resources Development and Production  
Committee on Energy and Natural Resources  
United States Senate  
Washington, D.C. 20510

Dear Senator Warner:

This responds to your July 11, 1985 letter posing a number of questions on the Office of Surface Mining's proposed permit fee regulation. I have enclosed the answers.

Please let us know if you or your staff would like to discuss this further.

Sincerely,

Acting Director

Enclosure



## PERMIT FEE QUESTIONS AND ANSWERS

1. Q. What is encompassed by the language "actual cost incurred by the Interior Department in providing these services"? (Murkowski)  
  
A. Under the proposal, the language could include the Department's direct and indirect costs of any labor, management, materials, machines, travel, overhead, contracts, environmental study or documentation, or other necessary or appropriate item of cost. This list is not meant to be inclusive, but merely represents some typical costs the Department may incur in providing a covered service. The comments received in the public participation process will assist OSM in determining those costs most suitable for recovery.
  
2. Q. In a State which has very few coal mines, such as Alaska, will "actual cost incurred" include general administrative overhead costs necessary to ensure compliance with any OSM permits issued in the State? (Murkowski)  
  
A. As proposed, the recovery of both direct and indirect costs is possible. The proposed rule would apply only to Federal lands in Alaska. It would apply only where OSM is the regulatory authority or where Federal approval of a mine plan is required. Primacy States (e.g., Alaska) would continue to establish their own fee structures.

3. Q. If the answer to question 2 is yes, how do you propose to allocate those costs among a small number of mine operators? (Murkowski)
- A. Under the proposed rule, OSM would keep a complete, accurate and detailed account of the direct cost of providing a particular service. Indirect costs (general administrative overhead) could be calculated on a national as opposed to a State-by-State basis. Also, under the proposal, mines producing under 100,000 tons per year would pay no more than \$500. In addition, however, OSM solicited comment in the proposed rule on whether \$500 was an appropriate ceiling for defining "small operator" or whether some other figure should be used.
4. Q. To what extent, if any, do the typical processing costs for a western mine differ from such typical costs for an Alaskan coal mine? (Murkowski)
- A. OSM estimates typical permit processing costs for western mines at from \$37,000 to over \$110,000, with an average cost of \$60,000. Where an environmental impact statement was required for a western mine, the processing cost increased by an amount ranging from \$75,000 to \$200,000. Since OSM has never processed a permit application for an Alaskan mine, it has no cost data for comparison.
1. Q. Have you considered crediting the applicant's costs (i.e., cost of preparing an environmental impact statement) against any possible fee? (Bumpers)
- A. The proposed rule relates to the recovery of costs incurred by the Department. The Department's costs, hence the permit fee, would be lower for operators who have conducted environmental studies that are useful in the permitting process.

2. Q. Please explain OSM's justification for charging a permittee for the cost of oversight and review of cooperative program permits where the Secretary has delegated the permitting responsibility to the State. (Bumpers)

A. OSM has not proposed to recover the costs of oversight. OSM has proposed to recover Departmental costs of reviewing mining plans, a non-delegable responsibility under the Mineral Leasing Act (MLA). As part of its independent analysis of the operation and reclamation plan portion of the Surface Mining Act permit application during this MLA review, OSM will necessarily be looking at the State-issued Federal lands permit.

3. Q. How did OSM arrive at its estimates of the average costs for reviewing a western permit? (Bumpers)

A. OSM based its estimates on data from the processing of permits at its Western Technical Center (WTC) in Denver. The WTC estimated the labor, contract and travel costs, plus overhead, based on its recent experience.

4. Q. Are you aware that Consolidation Coal Company did an analysis of permit costs in which it found that the average costs for reviewing western permits approximate more than \$200,000 and range between \$30,000 and \$50,000 for the review of an eastern permit? This contrasts significantly with OSM's cost estimate of \$60,000 for a western permit and \$6,000 to \$29,000 for an eastern permit. Can you explain the discrepancy between these figures? (Bumpers)

A. We have not seen the company's analysis or data and so cannot comment on it. The Consolidation Coal Company numbers are consistent with what we understand it is costing applicants to prepare permit applications. We would be pleased to review data from Consolidation Coal to determine the source of any discrepancy.

5. Q. Has OSM considered what effect phasing out cooperative agreement grants would have on the competitiveness of Federal coal? If so, what are your conclusions?  
(Bumpers)

A. OSM has neither proposed nor endorsed the phasing out of cooperative agreement funding. Consequently, OSM has not analyzed this concept.

6. Q. Do you believe that phasing out such grants would eliminate an incentive for States to enter into cooperative agreements? (Bumpers)

A. OSM agrees that phasing out such grants would be a serious detriment to the cooperative agreement concept. It would be contrary to the policy of encouraging one regulatory authority in each State to expect the State to pick up the cost of regulating Federal lands within its boundaries.

7. Q. Why does OSM propose to impose permit fees in Tennessee retroactive to October 1, 1984? (Bumpers)

A. OSM has proposed this as one of three possible implementation dates. The other two were the date of the permit fee proposal in the Federal Register (February 22, 1985) and a date 30 days after promulgation of the final rule. In proposing the October 1, 1984 date, OSM considered three factors: First, it marks the beginning of the Federal programs for Tennessee (promulgated in the October 1, 1984 Federal Register) and Indian lands (promulgated in the September 28, 1984 Federal Register). Second, it is the beginning of a new fiscal year, and thus a logical benchmark for accounting purposes. Third, it is the date on which OSM implemented the cost accounting procedures necessary for determining the actual cost of providing a service.

8. Q. What effect, if any, do you feel the recovery of costs will have on State primacy, in terms of States retaining their primacy? (Bumpers)

A. We do not expect the Department's cost recovery rule to significantly affect primacy States or to diminish their interest in retaining primacy. Since the rule would apply only when OSM is the regulatory authority or when Federal coal is involved, it would have no effect on State grants for their regulatory programs.

On February 22, 1985, OSM proposed a rule to increase mining permit fees to cover a variety of regulatory program costs in Federal program States, on Indian lands, and on Federal lands in States without cooperative agreements.

1. Q. Does OSM intend to propose a similar rule for primacy States?

- If so, who will set the permit fee rates; the States or OSM?
- Do you anticipate that since the States are actually performing the permit review that they might be the most appropriate authority to set the rates?
- If the States are involved in setting the rates, what prevents the State legislatures from being involved as well?
- Certain States have been pressured by their State legislatures and State industry into reducing reclamation bond levels to amounts inadequate to ensure adequate third party reclamation. What will prevent similar pressure from being applied to a State to reduce permit fees to levels inadequate to cover proper permit review? (Bumpers)

A. OSM does not intend to propose a rule governing States' ability to establish and collect permit fees. Section 507(a) of the Surface Mining Control and Reclamation Act provides that permit applications "shall be accompanied by a fee as determined by the regulatory authority." Where the State has primacy, it is the regulatory authority, and it is responsible for setting permit fees.

- When the States are performing the permit review, they are the appropriate authority to set permit application fees.
- The involvement of the State legislatures in setting permit fee rates is appropriately a State matter.
- All States pay a portion of the cost of their regulatory program. Whether the State raises that money through permit fees or some other mechanism is their choice. Most States do not count on permit fees as a major component of their financial support. This rule will have no effect on how a State chooses to support its program.

2. Q. If OSM intends to set a mandatory permit fee level in primacy States, what criteria will it use to determine the minimum amount?

- How will OSM differentiate between the many variables from State-to-State and permit-to-permit?
- If OSM sets a minimum guideline, is there a chance that some States will be overcharging and other States undercharging? (Bumpers)

A. OSM does not intend to set a mandatory permit fee level in primacy States. Under the Act, it is the State which, as the regulatory authority, sets fees applicable to its own circumstances and criteria.



3. Q. If OSM does not intend to propose a similar rulemaking for primacy States, why not?

- The intent of the Surface Mining Control and Reclamation Act of 1977 (SMCRA) is to establish national minimum standards, whereby industry across the nation experiences equitable regulatory restrictions. By not imposing increased permit fees in primacy States, is OSM imposing an inequitable burden on industry operating in Federal program States and on Federal lands?
  - If OSM does not propose a similar rulemaking for States with regulatory primacy, would this give operators in these States a competitive financial advantage over companies mining on Federal lands and in Federal program States affected by the current rulemaking?
  - By imposing this rule only in Federal program States, does OSM anticipate any Federal program State to be pressured by their State industry and State legislature into seeking primacy to avoid an increase in permit fees, despite the fact that the State may not be ready or capable of implementing and enforcing primacy in a responsible manner? (Bumpers)
- A. As noted in answer to an earlier question, OSM does not intend to propose a rule governing primacy States' ability to establish and collect permit fees. Section 507(a) of the Surface Mining Control and Reclamation Act provides that permit applications "shall be accompanied by a fee as determined by the regulatory authority." Where the State has primacy, it is the regulatory authority.

OSM is conducting an economic analysis under Executive Order 12291 to determine, among other things, whether under the proposed rule operators in primacy States would have a significant competitive financial advantage over operators in Federal Program States and on Federal Lands. The analysis will be completed by early summer of 1986, and the Subcommittee will be advised of its conclusions.

OSM will ensure through State program review and oversight that States obtain and retain primacy only when they are ready and capable of enforcing primacy in a responsible manner.

4. Q. By imposing this rule on Indian lands and not in primacy States, is OSM providing an incentive for industry not to seek permits on Tribal lands in lieu of the cheaper permits obtainable in primacy States? (Bumpers)

A. As mentioned in a previous answer, OSM will be conducting a thorough economic analysis on the potential financial impacts of this rule, and this question will be addressed in that effort.

OSM proposes to provide small operators (under 100,000 tons per year) with a waiver of fees for any actual costs in excess of \$500. OSM's own calculations show that permit review costs in the Eastern States (traditionally where small operators mine) range between \$6,000 and \$29,000.

1. Q. Who will pick up the additional costs incurred by the review of small operator permits? Will it be the larger operators or the Federal government through congressionally appropriated grants? (Bumpers)

A. The additional costs would be borne by the Federal government through appropriated funds.

2. Q. How was \$500 chosen as a cut-off level for small operators? (Bumpers)

A. OSM solicited comment in the proposed rule on whether \$500 was an appropriate ceiling or whether some other figure should be used. OSM considered the \$500 cut-off low enough not to threaten the economic viability of a small operator, and sufficiently high to discourage frivolous applications.

In its proposed rule, OSM proposed not to require permit fees to cover the cost of inspection and enforcement, although existing law would allow this. OSM claims that this will ensure that inspection and enforcement continues to be performed adequately without being "inhibited by any inadvertent concern for the costs that might be imposed on surface mining operators resulting from such activities." There has been concern over recent years that certain Federal mine plan review processes have been inadequate and incomplete.

1. Q. If OSM is concerned that its enforcement performance would be unduly compromised by the permit fee question, then why is it not just as concerned over its influence over adequate permit review?
- Q. By the same argument, is there an opportunity under this proposal for Federal mine plan review processes to be subjected to short-cuts in order to keep down the costs to the operator? (Bumpers)
- A. OSM believes that the structured and comprehensive nature of permit and mine plan reviews, involving a considerable staff effort by the agency, along with the presence of statutorily specified criteria, reduces the need for concern in this area. Detailed standards for permit review exist. Established review and control procedures provide the checks and balances necessary to ensure that permit review remains adequate and that short-cuts are not taken.

3. Q. According to OSM, a Federal mine plan review ranges between \$37,000 and \$100,000 with an average cost of an EIS being \$60,000. Do you believe that OSM's technical centers might be pressured into keeping costs low regardless of necessary or required analysis that might drive up the permit fee? (Bumpers)

A. No. As stated before, OSM will be acting to ensure sound, quality analyses in an effective and efficient manner, with priority on producing a quality product while minimizing costs.

OSM proposes to require a permit applicant to make a downpayment of \$1,500 when filing a permit application (small operators may submit an advance payment of \$500). The balance must be paid in full within 30 days after receiving a bill from OSM for the true costs incurred by the permit review. An installment payment plan over 5 years (plus interest) is also available.

1. Q. Please provide the Committee with a detailed plan explaining:

- How the agency will ensure collection;
- How this new collection duty interfaces with OSM's proposed "control rule" regarding the financial responsibility between contract and subsidiary companies with their controlling larger companies;
- How it will deal with payment failures;
- Any additional resources that OSM will need to implement and enforce this new responsibility; and
- How it interacts with other enforcement computer tracking systems. (Bumpers)

A. OSM proposes to ensure collection by making payment a condition of the permit. The proposal provides for several options for payment, including deferred payment, and specifies that any failure to pay fees deferred until after permit issuance would subject the permittee to the full range of enforcement provided by the Act, including suspension or revocation of the permit.

OSM's proposed "control rule" would define the phrase "own or control" for purposes of section 510(c) of the Act. Thus, it would define who is liable for payment of the fee.

Failure to pay permit application fees could result in permit suspension or revocation and preclude an applicant from obtaining subsequent permits.

Permit fees would be billed and collected by the OSM Division of Financial Management. No additional resources would be required to bill, collect, or account for permit fees on federal permits.

OSM's existing and planned computer tracking systems will include the data needed to implement permit fee collection. Fee billing and collections would be tracked on an AML computerized tracking system in Denver as a separate module of the system. Periodic reports showing bill and payment status would be generated as needed. Funds would be deposited in a general receipts Treasury account.



1. Q. I'm particularly perplexed by how you would prospectively budget for the anticipated revenues from the permit fee proposal. If next year you expected 850 million tons of coal to be produced, how much of that would be from newly permitted mines that would be subject to a fee and therefore, from which you could derive revenues? How much of a cost would that impose on those operators applying for new permits? (Warner)

A. OSM has not made any projections of the revenues to be derived from permit fees because such estimates would depend upon the specifics of the permit fee rule as ultimately adopted. Such revenues would go to the Government's general fund and not to OSM.

With respect to the costs OSM's permit fee rule will impose on operators, OSM is now conducting an economic analysis to identify the impacts on industry of such a rule. The analysis will be completed in early summer of 1986.

2. Q. In a State as Washington where there might only be one permit application a year, does this mean the applicant would have to pay the full Federal cost for that state for one or maybe two years if no additional permit applications are expected the following year? (Warner)

A. No. Under OSM's proposal, each operator would pay only the costs incurred by the Department in processing his or her application. That application would be processed in the Western Technical Center as are all other Federal permits in the west.

3. Q. In his Round I Decision in In Re Permanent Surface Mining Regulation Litigation, Judge Flannery ruled that OSM must maintain jurisdiction over all federal lands and review and approve all permits. Does this mean that operators in cooperative agreement states are going to pay permit fees for the same work for State and Federal review? (Warner)
- A. Judge Flannery's ruling upheld the Secretary's authority to delegate to States permitting responsibility on Federal lands under cooperative agreements. The Secretary may not delegate review and approval of mine plans under the Mineral Leasing Act (MLA) where there is leased Federal coal involved. In reviewing the mine plan, the Department will necessarily be considering the operation and reclamation portion of State-approved permit applications, since Judge Flannery ruled it to be a component of the mine plan. Operators will be paying twice for the limited duplicative review required by the court only if the State collects a permit fee on the same basis. The Administration is appealing Judge Flannery's decision.
4. Q. Have you analyzed the impact of permit fees on coal production in States such as Washington and Tennessee where OSM has primary jurisdiction to determine what amount of those states' historical production share will be impacted by the higher cost of obtaining permits? (Warner)
- A. OSM is now conducting an economic analysis of the impacts on industry of the proposed permit fee rule. The analysis will be completed by early summer of 1986.

5. Q. Was the concept for full cost recovery of permitting originated through OSM or did the Office of Management and Budget direct you to develop it? (Warner)

A. OSM has an obligation to require a permit fee under section 507(a) of the Act. OSM initiated the proposal for the permit fee rule and has taken into consideration the views of OMB in its development.

6. Q. GAO states that there is no reason OSM must tie its small operator assistance provision to the SMCRA SOAP definition since the 100,000 ton limit is statutorily only tied to SOAP. Do you agree and why did your proposed rule so limit an operator's eligibility? (Warner)

A. OSM agrees that it is not tied to the 100,000 ton threshold. The proposed rule suggested 100,000 tons as a possible criterion for small operators because the Act already included that figure. OSM has solicited comment, however, on whether small operators should receive different treatment from other operators, and, if so, on what criteria should constitute "small."

7. Q. One type of application OSM did not specifically propose to collect fees for is for experimental practices. Does OSM plan to recover fees for its concurrence on experimental practice permits; and if so, what concerns do you have that this may provide disincentives to operators otherwise interested in experimental practices? (Warner)

A. Where OSM is the regulatory authority issuing the permit, any additional review cost relative to an experimental practice would be included. Where States are the regulatory authority, the proposed regulation would not cover costs incurred by the Department in concurring with the decision of the regulatory authority to approve an experimental practice.

## APPENDIX II

## Additional Material Submitted for the Record

**Alabama Coal Association**

May 7, 1985

William M. Kelce  
PresidentThe Honorable Jeremiah Denton  
516 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Denton:

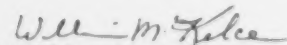
Enclosed for your consideration is a copy of comments submitted by the Alabama Coal Association to the Office of Surface Mining regarding OSM's proposed rules governing the collection of application fees for various permit processing activities.

The imposition of such a concept would be wholly unprecedented by any other federal statute to date. This significant change in public policy should not be developed independently by a governmental regulatory agency, but should be thoroughly scrutinized by the Congress of the United States.

We are requesting your assistance in opposing this effort to increase federal permit fees, particularly as currently proposed by OSM.

It would be greatly appreciated if you would voice your opposition to the proposed rules in writing to Secretary of Interior Hodel.

Sincerely,

  
William M. Kelce  
President

WMK:sk

Enclosure



## Alabama Coal Association

May 7, 1985

William M. Kelce  
President

Office of Surface Mining  
Administrative Record Room  
Room 5315L  
1951 Constitution Ave., N.W.  
Washington, D.C. 20240

ATTENTION: Murray Newton

Dear Mr. Newton:

The Alabama Coal Association appreciates this opportunity to provide comment on the Office of Surface Mining's proposed rules governing the collection of application fees for various permit processing activities. As noticed in the Federal Register of February 22, 1985, OSM proposes to collect fees for permits to conduct surface coal mining and reclamation operations, coal exploration permits, processing of mine plans and mid-term reviews of mining and reclamation permits.

The Alabama Coal Association is a state trade organization that represents 92 per cent of the coal produced in the State of Alabama. The comments and recommendations submitted herein reflect ACA's continued interest and growing concerns with this significant issue. The comments submitted address both the philosophy of fee collection and specific elements to the proposal.

ACA members strongly feel that the regulatory proposal should not be implemented, most importantly because: (1) the principle of recovering government costs from corresponding beneficiaries has been inappropriately applied to mine regulation; (2) the proposal lacks substantive economic analysis; and (3) the OSM proposal is replete with ambiguities and inequities and, as a consequence, is premature.

First, OSM's proposals fail to recognize the true beneficiaries of surface coal mine regulation. The general public is the overwhelming beneficiary of the numerous and thorough governmental reviews of an operators' mining, reclamation and environmental control plans. As appropriately set forth by Congress in Section 102(a) of the Surface Mining Act, the statute and subsequent regulatory program were established to ensure that the health, safety and welfare of

the public would be protected during and after mining activities. Further, such proposals fail to account for other benefits society derives from mine regulation, such as improvements in wildlife habitat, better agricultural land, research to expand man's knowledge of toxic materials handling and the management of many different types of disturbed land. Finally, mine regulation does not suit the concept of a "user fee", inasmuch as operators do not derive special limited benefits from the regulatory authority, as for example an applicant seeking license for a power plant in a limited marketplace. In fact, imposition of such a concept would be wholly unprecedented by any other federal environmental statute to date. Despite the rigorous environmental regulatory schemes imposed by the Clean Air Act, the Clean Water Act, and the Endangered Species Act, to name only a few, none of these laws seek full cost recovery from their affected populations for the benefits of being regulated. Indeed, such a significant change in public policy should not be developed indepently by a governmental regulatory agency, but should be thoroughly scrutinized by the Congress.

Second, OSM has failed to provide, and has not conducted a thorough economic impact analysis of the proposed rules. In fact, OSM collected only four months of data on which to base its permit review cost estimates, and excludes numerous indirect cost elements proposed be recovered. This is clearly inadequate information. Despite its assertion that the regulation would not have an annual effect on the economy of \$100 million or more (thus triggering such an analysis), there is little doubt that significant benefits would be derived by analyzing at least several crucial issues. Among them are whether and how much production will be shifted from federal lands as a result of an initial permit fee assessment on these lands and not on private lands, causing an ultimate loss of revenues to the federal government; what the impact would be if a state dropped its cooperative agreement for mine regulation on federal lands to help prevent double charging of operators for OSM concurrence; and what the impact would be on the domestic coal market vis-a-vis world coal and other energy sources would be as a result of this added tax. There is no question that these issues, among others, must be studied by OSM to determine the cost impact of these proposals before it takes final action on them. Until OSM can provide specific information on the national and individual cost impacts, the proposed rulemaking should be placed in abeyance.

Finally, from a pure procedural perspective, publication of the proposed rule is premature. It has come to ACA's attention that OSM is currently drafting revised regulations governing Federal lands to comport with Judge Flannery's July, 1984 decision. These draft rules have not yet been made available for review and comment. However, the permit fee rules under current consideration will be applied to existing and future mine operations on Federal lands and will therefore be impacted by the unpublished proposals. Thus, until the industry and OSM have had an adequate opportunity to study the proposals in tandem, OSM should suspend further consideration of the permit fee rules.



In addition to these three broader issues, there is significant concern in the coal mining industry that OSM's proposal virtually eliminates any incentive for the agency to conduct its permit review activities in an efficient and cost-effective manner. This course is opposite the efforts to incorporate fiscal accountability and cost efficiencies the administration is broadly pursuing in all areas. An open-ended accounting system encourage excessive government spending and potential over-regulation. It is further compounded by the fact that OSM will not accept the burden of proof when its clients (operator/applicants) challenge the agency for failure to make a timely decision or failure to be cost-efficient. This is unacceptable and inconsistent with established business practices.

Further still, should a fee be imposed, especially on an open-ended basis, it will likely provide a disincentive for applicants to provide extensive data during permit review. Since the more information provided to the reviewer, the larger the cost to the applicant will be, many operators may provide the minimum acceptable amount of data. This is not beneficial to the whole process. In addition, an open-ended system creates a large problem for most coal companies, since unknown dollar amounts cannot be accounted for in a company's budget, and significantly impair an operator's ability to reliably analyze his costs in the development of contractual bids. While a fixed fee system, such as a fixed filing fee accompanied with a fixed acreage fee would certainly reduce these problems. OSM must provide sufficient documentation on its cost estimates before ACA can provide substantial comment on the advisability of a fixed cost vs. actual cost system.

Not only is it apparent that OSM failed to complete a thorough economic analysis, but it is clear that it neglected to consider how it would account for a variety of costs associated with the application process. For example, SMCRA calls for public participation throughout each aspect of the mining and reclamation operation, yet the rule does not address whether or how OSM would recover costs of its personnel reviewing public comments submitted during the permit application process. ACA believes that, consistent with Congress' intent that SMCRA benefits the general public, operator/applicants should not be charged for this review. On the otherhand, if OSM moves forward with its proposed fee collections, it should equitably charge citizens who submit unsuitability petitions for OSM's review, especially since the process is often an extensive one. OSM should not selectively apply its cost recovery principles to operators only. Further, how should costs for cumulative hydrologic assessments which extend beyond permit boundaries and thus benefit other operators be assessed? Who should be charged for pre-determinations on alluvial valley floors? Each of these circumstances must be carefully considered by OSM to ensure that any fees imposed are established equitably, and will not result in a reduction in the effectiveness and intent of the law.

An item or activity that OSM did consider in its cost recovery proposal include the preparation of an environmental impact statement (EIS). ACA is concerned that OSM currently lacks substantive guidelines for determining when an EIS needs to be prepared, and any assessment of whether to complete one based on a variety of factors including fiscal reasonableness, will be dismissed in favor of conducting more studies at industry's expense if the proposal is approved. Coal companies must be assured, by having the ability to review sound decisionmaking criteria, that this will not be the case.

The proposal also suggests that operators may be required to pay for work conducted by other agencies within the Department of Interior associated with their application. OSM did not directly state whether these agencies currently bill OSM for the costs of their respective reviews. In fact, it is unclear whether these agencies even have accounting systems in place to identify their direct and indirect costs associated with SMCRA reviews. It is certainly reasonable to assume they do not, since even OSM just began to establish its system four months prior to the publication of the proposed rules. Thus, once again it is clear that OSM's rulemaking is premature and must be withdrawn until such questions are resolved.

Another area OSM is soliciting comments on is whether to charge operators for inspection-related costs. ACA agrees with OSM that these costs should be excluded, first because the public is the primary beneficiary of such activities, and second, using OSM's logic, because it is clearly not a service being requested by an operator, as would be the case with permit application reviews. Additional complications would have to be considered, such as who would absorb the cost of an inspection as a result of a citizen request, if OSM chose to break ground on this area at all. Finally, in utilizing the same case OSM drew its rationale from, the Mississippi Power and Light vs. U.S. NRC (5th Cir. 1979) decision cites a quote from the Bureau of the Budget Circular No. A-25 regarding a special benefit for which a charge should be imposed:

"...when a Government-rendered service...is performed at the request of the recipient and is above and beyond the services regularly received by other members of the same industry or group..(e.g., ...an inspection after regular duty hours)".

Thus, it is clear that inspections during regular working hours should not be considered a special benefit to the operator and should not be charged to him.

Additionally, ACA believes that mid-term permit reviews should not be charged to coal operators. The rationale presented by OSM is at best a poorly twisted interpretation of SMCRA's 507(a), as evidenced even by OSM's preamble to the proposed rule. Initially, on page 7526 OSM quotes section 507(a) "The regulatory authority may develop procedures as to enable the cost of the fee to be paid over the term of the permit." to justify charging for services rendered for activi-

ties other than the permit application itself. However, several pages later, on page 7529 OSM uses the exact same language to justify providing for installment payments. Congressional intent and the plain language of the statute make it clear that this section refers to the use of an installment payment plan, not to OSM's ability to recapture costs throughout the life of the permit. For this reason, unless OSM can provide sound justification, operators should not be charged for statutorily mandated mid-term permit reviews.

If, despite ACA's numerous suggestions as to why the rulemaking is premature, OSM decides to pursue promulgation of a final rule, there are a number of concerns ACA has regarding the 'mechanics' of the fee collection. First, and most importantly, OSM cannot simply make the rule retroactive to February 22, 1985 or even back to the beginning of this fiscal year without strong evidence that it would not be blatantly arbitrary and capricious to do so. Not only would operator/applicants have been improperly notified of a pending fee, but by its own admission, OSM did not have a detailed accounting system to monitor such costs to be charged. In fact, OSM was unable to provide any cost estimates for activities conducted outside the technical centers. Thus, implementation must not occur until some time after promulgation of the final rule.

Second, in its discussion of calculation and billing of the fee, OSM provides no explanation whatsoever as to why it would consider billing a recipient of its services for work completed at any point in the review process, rather than postponing billing until a final decision was made. This is extremely inequitable since OSM proposes to be authorized to withhold the decision being sought until after payment is made, providing the agency with no incentive to do a timely job of fully processing an application. First, there is a significant possibility that by the time OSM bills an operator and the company pays the bill, many months may pass since a decision was or could have been rendered. Rather than withholding a decision, OSM should consider issuing a conditional decision, continuance contingent on timely payment. Second, it creates an additional problem for the applicant as well who has no idea what his time frame is for expecting a bill from OSM. Therefore, unless a specific phased billing approach is established in advance of work conducted with known billing cycles, OSM should not be authorized to pursue payment at its pleasure. Furthermore, it is only reasonable that if OSM is going to hold an applicant's money in advance of work completed (\$1500 or \$500 advanced payment), and subsequently determines that a refund is in order, an applicant should be reimbursed that amount with interest, since the government had in effect borrowed it from the operator.

Third, in its discussion of payment procedures OSM neglected to explain how it arrived at the \$1500 advanced payment figure. ACA agrees that the amount should be fairly nominal, but it is unclear how that amount was settled on. In addition, as stated previously in these comments, SMCRA (Section 507(a) clearly authorizes the use

of installment payments over the term of the permit, and thus OSM should not even contemplate excluding this alternative payment plan. Furthermore, all sized operators should be able to utilize this procedure, not just smaller companies, particularly in light of the uncertainty in amount to be due, and the lack of economic vitality in the coal market nationally, not just among smaller companies.

Fourth, OSM indicated it will not waive or refund any part of the fee, except to qualified small operators, regardless of mitigating circumstances. This seemingly excludes any possibility raised by OSM for consideration of undue hardship cases. This is a reasonable provision, since despite OSM's attempt to provide assistance to "small operators", it will likely provide relief to only a very small segment of the industry. Unless OSM can tie the provision to some definition other than the 100,000 ton requirement established for SOAP, there will be few producers helped by this clause since it may not be economically viable for these small producers to remain in business, even under current regulatory requirements. Unfortunately the failure of the SOAP program is largely due to the inadequately low arbitrary production ceiling of 100,000 tons established by Congress in 1977.

This is clearly borne out by recent industry statistics compiled from DOE's Energy Information Administration. During the period between 1977 and 1983 small surface mine operators producing up to 200,000 short tons annually suffered startling losses in nationwide production share with corresponding large decreases in number of mines. These figures, ranging from 23 percent to 42 percent are even more alarming considering that coal production nationwide was increasing 13 percent over the same period. Companies producing 200,000-500,000 tons suffered a nearly 9 percent loss of market share, while large mines producing over 500,000 tons gained over 45 percent of the overall share of production. Small producers are the force which maintains a competitive market, yet the current and proposed costs associated with the surface mining regulatory program have increased the economies of scale necessary to operate in the coal industry and will continue to extract a heavy toll on producers mining under 500,000 tons annually. Therefore, OSM should reexamine its proposed exclusions and if it intends to realistically provide relief to those companies most affected by the proposed fees, it could consider revising its eligibility limit to at least 500,000 tons per year.

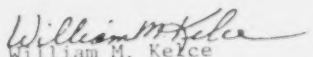
Finally, one type of application OSM neglected to discuss for which it is mandated to provide its services is an experimental practice permit application. Even in states with primacy, OSM is statutorily mandated to provide final approval of an experimental practice permit. This program is still in its fledgling state, primarily because operators willing to try innovative technologies to advance the state-of-the-art have been discouraged by the permit process and its associated delays. If OSM plans to propose in a future rule-making to specifically charge for these services, it will surely provide a significant enough disincentive to permanently disable the program. This would be a great disservice not only to the industry,

but more importantly, to the general public who stands to benefit from these activities in the long run.

In conclusion, it is clear from the majority of issues raised herein, that OSM has a significant amount of additional analysis it must do, before it can complete this critical rulemaking. ACA urges the agency to move aggressively to complete a thorough regulatory impact analysis before it moves forward, since without it all parties are still analyzing the principles and mechanics of cost recovery in the dark.

Thank you once again for this important opportunity to be heard. ACA members and staff would be pleased to provide OSM with additional assistance if requested.

Sincerely,



William M. Keyce  
President  
Alabama Coal Association

WMK/vhp

## ALABAMA BY-PRODUCTS CORPORATION

FOUNDRY COKE - COAL - COAL CHEMICALS



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TELEX NO. 59810

July 11, 1985

Senator John Warner, Chairman  
National Research Development and Production Sub-Committee  
Senate Energy and Natural Resources Committee  
Washington, D. C. 20510

Re: Coal Mining Permit Fees

Dear Senator Warner:

I understand that you held an oversight hearing on July 9, 1985, regarding cost recovery by OSM and the GAO report related to that cost recovery. I further understand that the record is being held open for fifteen days and I am writing you to voice the comments of my company and opposition to this proposed cost recovery through permit fees. First, we believe that the principles of cost recovery have been applied inappropriately to mine regulation since it is the general public who benefits from the enforcement of the Surface Mining Act.

OSM's proposal lacks appropriate substantive economic analysis in that the cost estimates were based on only four months of data. No regulatory impact analysis was done. OSM also neglected to specifically define direct, indirect and other associated costs to be charged permit applicants.

In its reasoning as to inspection and enforcement costs, OSM cites the case of Mississippi Power vs. NRC. However, this case can be distinguished from our situation because a holder of a permit under the Surface Mining Law is provided no limitation on his liability by holding a valid permit. Neither do inspections assist him in complying with all of the terms of the Act. Further, inspections clearly benefit the public rather than the permittee and thus shouldn't be charged to operators.

In the case of fee disputes, OSM should accept the burden of proof for challenges from an operator. The operator should be allowed to withhold a portion of the bill until the dispute is settled and there should be a defined procedure for reviewing the Department of Interior's efficiency and petitioners should be allowed to challenge that efficiency.

We believe that it is improper for OSM to withhold application decision until after full payment is made. It would seem to more fair for a conditional

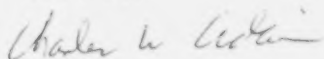


decision to be issued contingent upon timely payment. Further, OSM should postpone billing an applicant until final decision has been made on the application.

As to the retroactive application of this procedure, I wish to point out that any retroactive date would be arbitrary and capricious because OSM has not properly notified applicants of a pending fee.

I wish to thank you for considering the position of Alabama By-Products Corporation in regard to this proposal being considered by your Sub-Committee.

Yours truly,



Charles W. Adair  
President

CWA:JFM/mcb



**CENTRAL MINING, INC.**  
P.O. Box 2585  
JASPER, ALABAMA 35502-2585  
1985 JUL 22 PM 12:45

PHONE: 221-4942

July 17, 1985

The Honorable John W. Warner, Chairman  
Natural Resources Development and  
Production SubCommittee  
Senate Energy and Natural Resources Committee  
Washington, D.C. 20510

RE: Coal Mining Permit Fees

Dear Senator Warner:

This statement is submitted on behalf of Central Mining, Inc. in reference to the final General Accounting Office's (GAO) report on full cost recovery by the Office of Surface Mining, which was the subject of an oversight hearing held on July 9, 1985. It is requested that this letter be made a part of the hearing record.

Central Mining, Inc. is a relatively small coal producer in Alabama, with an annual production of approximately 300,000 tons. It is from this prospective that we comment upon the GAO report.

GAO concludes that some small coal companies might find any production cost increase, no matter how small, a significant burden. This is an understatement. Small coal companies cannot spread out production cost increases as can a larger company with greater production and more diverse customers and markets. A matter of a few cents a ton can make an extreme difference in competitive bidding on utility contracts, and many small coal operators' business is tied to the utility market.

GAO predicted that the impact on coal demand and production from full cost recovery would be "minimal". What is minimal is the study and research which GAO conducted in preparing its proposal. GAO's report lacks an appropriate substantive economic analysis, neglects to do a regulatory impact analysis, and fails to adequately address the impacts on the Office of Surface Mining if it had to take over additional state programs. Although GAO proposes full regulatory cost recovery, it neglected to

specifically define and delineate all cost to be charged coal operators.

Despite numerous comments to the contrary, GAO persists in believing that coal operators granted a mining permit benefit from special services and privileges provided by the federal government and therefore, should bear their cost. Coal production and coal operators existed for many years prior to the passage of the Federal Surface Mining Act in 1977. The primary intent of that Act was to establish national environmental protection performance standards to protect public health and safety and the environment. The standards were imposed on coal operators by incorporating them in a permit to mine. It was never perceived that the federal government was somehow bestowing special services and privileges upon the coal industry by enacting these standards upon the coal industry. Rather, the standards were for the benefit of the public. It does not seem fair to impose these standards on the coal industry for the benefit of the public, and then require the industry to pay for the full cost of administering and enforcing these standards for the benefit of the public.

In conclusion, we submit that GAO's recommendations for full regulatory cost recovery and elimination of financial assistance to states are ill founded, would be a burden primarily to small operators, and would further erode the competitiveness of American coal in the world markets. Therefore, we urge that the GAO recommendations not be implemented by the Office of Surface Mining.

Very truly yours,

RUSSELL COAL, INCORPORATED

*Richard E. Dick*  
Richard E. Dick  
General Counsel

RED/jb  
RD-31

## Office of Coal Information and Policy

**coal**

William R. Taylor, Director, Colorado Mining Association, 1515 Cleveland Place, Suite 410, Denver, Colorado 80202-5192, (303) 534-1181

July 2, 1985

The Honorable John W. Warner, Jr.  
United States Senate  
421 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Warner:

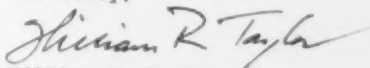
The Office of Coal Information & Policy of the Colorado Mining Association has learned you are conducting an oversight hearing on the Interior Department's Office of Surface Mining proposed rules to recover costs of regulating coal mining. OSM's proposed rules originally appeared in the February 22, 1985 Federal Register (7522 FR V50:36).

As we will be unable to participate directly in the hearings, I am enclosing a copy of the CMA Coal Committee's position concerning the proposed rules for consideration at the hearing.

We believe the proposed rules, as written, are inimical to the overall purpose of the the Surface Mining and Reclamation Control Act of 1977, and urge your committee review carefully the problems identified by the CMA Coal Committee.

Thank you for interest in this very important issue. Should you, or any of your committee members have questions regarding our comments, please do not hesitate to address them to my attention.

Sincerely,



William R. Taylor  
Vice President & Director

Enclosure:

51841



Office of Coal Information and Policy

# coal

William R. Taylor, Director Colorado Mining Association 1515 Cleveland Place, Suite 410 Denver, Colorado 80202-5192 (303) 534-1181  
July 2, 1985

The Honorable John W. Warner, Jr.  
United States Senate  
421 Russell Senate Office Building  
Washington, DC 20510

Dear Senator Warner:

The Coal Committee of the Colorado Mining Association wishes to thank you for the opportunity to provide comments on the Interior Department's Office of Surface Mining proposed rules regarding fees for processing applications for surface coal mining and reclamation operation permits, processing fees for coal exploration permits, fees for processing mining plans, and fees for mid-term review of surface coal mining and reclamation permits.

The Colorado Mining Association (CMA) is a trade organization founded in 1876 to foster and promote Colorado's mineral mining industry and all its various branches. Today the Colorado Mining Association represents more than 150 companies and more than two thousand individuals engaged in Colorado's mining activities. The Coal Committee was established under the aegis of the CMA in 1981 to represent the specific interests of Colorado's coal industry. The issues addressed in these comments include:

- o Clarification of the Applicability of the Proposed Rules
- o Fiscal Impact of the Proposed Rules
- o Primary Beneficiary of the Regulatory Program
- o Accountability of OSM under the Proposed Permit Fee System

**I. Clarification of Applicability.** The CMA Coal Committee believes the proposed rules are unclear with regard to their applicability to states with existing permanent programs. Under the proposed rules, the Secretary's non-delegable responsibility in the review of mine plans could be construed to include those states with permanent programs in the fee appraisal system. Under concurrence agreements between states with permanent programs and OSM, the proposed rules could potentially extend to all coal operations including those on non-federal coal lands. Additionally, required reimbursement for inspection and enforcement procedures could extend the proposed rules to those states where cooperative agreements are in force. Thus, the premise that the impact of the proposed rules is not major is unfounded.

Senator John W. Warner, Jr.  
 July 2, 1985  
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**II. Fiscal Impact.** OSM has indicated the number of mines affected by this rule does not warrant a financial impact assessment. While the number of mines operating on non-Federal lands is greater than those on Federal lands, the costs incurred by the Federal operations would be much higher, due to their larger size. Thus, the CMA Coal Committee believes that a financial impact assessment is warranted by the fiscal impact on those mines operating on Federal lands.

To determine identifiable costs OSM, under the proposed regulations, included many which represent general administrative overhead such as "fringe benefits, office space, heat, light, supervision, and other overhead."

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) does not contain an enumeration of those items which constitute "actual or anticipated costs of receiving, administering, and enforcing" a permit. However, the Committee Report to S 7 (companion bill to HR 2) notes:

Subsection (a) [Section 409] requires payment of an applicaiton fee which **may be sufficient** to cover the actual or anticipated cost of reviewing, administering, and enforcing the permit. The Committee, however, intends to allow the regulatory authority complete latitude to set the fee at a **nominal rate** if it so desires, **making up the balance of its expenses from other sources of revenue.** (Emphasis added) (S. Rept. 95-128, May 10, 1977)

We believe this indicated the Senate Committee's intent that the permittee bear a reasonable cost of permit administration, but that he not bear the full cost of the regulatory program. This interpretation is consistent with the policy of "reasonableness" in setting permit fees expressed by Section 304(b) of the Federal Land Policy and Management Act of 1976 (FLPMA) which states:

"...in this section 'reasonable costs' include, but are not limited to, the costs of special studies, environmental impact statements, monitoring construction, operation, maintenance, and termination of any authorized facility or other special activities. In determining whether costs are reasonable under this section, the Secretary may take into consideration actual costs (exclusive of management overhead)..."



Senator John W. Warner, Jr.  
 July 2, 1985  
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It is difficult if not impossible to determine a total fiscal impact without first determining associated costs. The CMA Coal Committee urged OSM to clearly delineate those specific costs involved in the permit fee system, how they are to be determined, and provide an adequate comment period on the proposed cost structure prior to promulgating a final ruling on permit fees. After delineating a satisfactory cost structure, OSM then should revisit the issue of the proposed rules' fiscal impact to determine if an economic impact assessment is warranted.

**III. Primary Beneficiary.** Bureau of the Budget Circular No. A-25 (September 23, 1959) clearly states:

"Where a service (or privilege) provides special benefits to an identifiable recipient **above and beyond those which accrue to the public at large**, a charge should be imposed to recover the full cost to the Federal Government of rendering that service."

The preamble of SMCRA clearly states the primary purpose of the act is "to protect society and the environment from the adverse effects of surface coal mining operations," and to "assure that surface coal mining operations are so conducted as to protect the environment." In charging the permittee the actual costs of permit administration as well as allocating overhead costs, the proposed rules imply that the primary beneficiary of OSM's permitting activities is not the public, but the individual permittee.

The CMA Coal Committee does not believe the Department is justified in seeking payment by industry or an applicant for costs associated with providing a service to the general public. Section 9701 of the Independent Offices Appropriation Act (IOAA) states that one of the factors to be considered when determining a charge is the "value of the service or thing to the recipient." The Federal Lands Policy and Management Act of 1976 (FLPMA) describes this factor in Section 304(b) as the "portion of the cost incurred for the benefit of the general public interest rather than the exclusive benefit of the applicant."

It is the stated intention of SMCRA to benefit the general public. To imply that the mining industry is the only identifiable or primary beneficiary of the Act indicates the overall inappropriateness of the proposed rules.

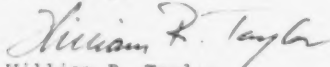
Senator John W. Warner, Jr.  
July 2, 1985  
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**IV. Accountability.** The permit fee ruling as proposed virtually eliminates any incentive within OSM to conduct its permit review activities in an efficient and cost effective manner, because any excessive activities and costs would be carried by the permit applicant. As a result, federal budget constraints and cost efficiencies would be negated. Such a philosophy runs totally contrary to any policy of efficient government.

For these reasons, the Coal Committee of the Colorado Mining Association has strongly urged OSM not implement these regulations.

The Coal Committee of the Colorado Mining Association wishes to thank you again for this opportunity to assist in this important oversight hearing.

Sincerely,



William R. Taylor  
Vice President & Director

51842

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Jasper, Alabama 35502-1549  
Telephone 205 387 0501  
Telex 261327

Garry N. Drummond  
Chief Executive Officer

**DRUMMOND  
COAL  
COMPANY, INC.**

July 3, 1985

Senator John Warner, Chairman  
National Research Development & Production  
Sub-Committee  
Senate Energy and Natural Resource Committee  
Washington, D.C. 20510

SUBJECT: Coal Mining Permit Fees

Gentlemen:

Our comments will consist of excerpts from G.A.O.'s report as follows:

The Congress enacted the Surface Mining Control and Reclamation Act (30 U.S.C. 1201) to provide uniform, minimum standards of environmental protection and land reclamation to control the surface effects of both underground and surface mining operations. The Office of Surface Mining Reclamation and Enforcement (OSM) was created within the Department of the Interior to oversee the development of these state regulatory programs. OSM has established regulations for carrying out the act.

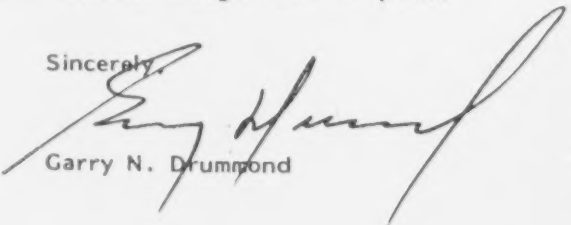
At the time of this review, 25 states had primacy authority to regulate coal mining on all state and private lands within their borders. These so-called primacy states have each enacted laws that paralleled the Federal Surface Mining Act and have promulgated regulatory programs that are consistent with Federal law and regulation and have been approved by the Secretary of the Interior. Two other states chose not to adopt their own regulatory programs and in these cases OSM programs are in place.

When states have primacy regulatory authority, OSM monitors and assists their performance by, for example, conducting its own occasional inspections and reviewing a sample of permits for consistency with the act and approved state programs.

There is no necessity to have OSM duplicating the duties of the state authority when OSM's assignment is to simply monitor the states with approved primacy authority.

In light of the above facts as stated by G.A.O., it would appear that OSM, having accomplished its assigned task, should now continue to monitor at a reduced budget and at public expense the assigned job.

Sincerely,



Garry N. Drummond

# Kentucky Resources Council

Post Office Box 1070  
Frankfort Kentucky 40602  
(502) 875-2428

July 9, 1985

Mr. Pat Sullivan  
United States Senate  
Subcommittee on Energy and Minerals  
360 Dirksen Senate Building  
Washington, D.C. 20510

Dear Mr. Sullivan:

I understand that Senator Warner and the Senate Subcommittee on Energy and Minerals has conducted a recent hearing into the matter of the collection from the regulated industry of the actual governmental costs of administration of the surface mining regulatory program under the 1977 Surface Mining Control and Reclamation Act.

I am writing to request that this letter be submitted into the formal record of that hearing for consideration by the Subcommittee in its deliberations on this important matter.

Initially, these comments are submitted by myself as the Director of the Kentucky Governmental Accountability Project of the Kentucky Resources Council. The Council is a non-profit membership-based coalition of small farmers, landowners, river recreationists and environmentally concerned individuals in the Commonwealth of Kentucky who are affected by improperly conducted surface coal mining and reclamation activities and who are

dedicated to prudent use of our natural resources and full implementation of our environmental-protection laws and programs.

The Council read with interest the recent General Accounting Office report regarding the recovery of regulation costs from the industry. In theory, the Council endorses the concept of cost recovery, since when the cost of doing business (including the cost of the regulatory program) is not borne by the industry in this case, the general public is required to expend general funds to subsidize the production and regulation-related costs of the industry. In a state where much of the coal is exported, the out-of-state coal consumers' costs are also being subsidized inordinately by Kentuckians through these general fund mining regulation-related expenditures.

In the Commonwealth of Kentucky, the cost of a coal permit, and of the related water discharge permit under the Kentucky Pollutant Discharge Elimination System, is miniscule when compared to the cost of permitting (excluding enforcement for the moment) such operations. The industry pays a meager \$50.00 for the water permit, and \$375.00 for the permitting fee, with an additional acreage fee of \$75.00 per acre. It is obvious that these fees do not begin to address the cost of permit processing, let alone the full costs of program administration. By statute the state agency is precluded from considering the cost of enforcement or administration of non-permit related programs (such as Title IV) in establishing the permit fee, and the permit fee is capped at the levels described above.



A direct result of this meager cost recovery is that the program must compete for funding with a number of other "worthy" environmental programs, that other state environmental programs within the same state environmental agency which do not have a federal "oversight" have their budgets robbed to pay for mining primacy, and that periodic staffing crises occur in the implementation of the Kentucky permanent regulatory program, which have had a destabilizing effect on both the program administration and the planning of the regulated industry.

The Council endorses the general concept of a partial cost recovery; however there are a number of practical considerations that must be factored into any approach that urges or requires cost recovery by the individual state programs through an end to federal matching dollars for program administration.

A number of states periodically face the "hard choice" as they proceed with the implementation of the state permanent regulatory program, of determining whether it was "worth" the political, financial and administration drain on the state to continue to be the primary regulatory authority under an approved "state program." One of the primary justifications for continued state retention of primacy is the matching funding for program administration, the continuation of AML program monies into the state through the approved program, and the industry perception that there is a benefit in state administration of the program. An end to the matching funding will be a hard and bitter pill for many state legislatures to swallow, and as one midwestern state,

Indiana, has indicated, an end to the 50% matching funding will likely result in OSM assumption of the program--a matter which OSM is not equipped to undertake at this time. An end to matching funds will not necessarily equate with state assessment to industry of 100% of the programmatic costs, because most states lack the ability and political will to levy such costs against such powerful industry. The more probable scenario would be either a reversion to OSM of the state program or a further weakening of program staff and of other state environmental program budgets to make up the deficit.

The Council is further concerned that any cost-recovery approach be tiered in order that smaller operators not be faced with prohibitive start-up costs for permitting. The federal Act provides that the permit fee may be paid over the term of the operation, but many states have been reluctant for administrative reasons to allow such incremental payment. It may be necessary to mandate the availability of such an approach by regulation as part of a cost recovery program, to protect smaller operators.

The Council would suggest that in lieu of the proposed GAO cut-off of federal monies, that the Subcommittee consider a percentage-based cost-recovery approach, through which the state program commits to recover a certain percentage of the actual program administration costs from the regulated industry in order to become or remain eligible for matching monies to administer and implement the state program. The state agency would have the flexibility to determine who among the permittees would bear what

percentage of administration costs, but the state-offset money would have to come from the mining permitting program rather than elsewhere in the state budget.

Finally, the Council hopes that any cost recovery program and funding reduction or phase-out be done on a gradual and incremental basis, in order to avoid the certain disruption of the administration and enforcement of the surface mining programs by the states that an immediate cut-off would engender. If such a cautious approach is not taken, the Office may find itself in the business of being primary regulatory authority for a number of major coal state programs which the Congress would have to fund, a bequest from state legislatures who have become less enamored of the idea of "primacy" even with 50% matching funds as they have had to grapple with the hard reality of enforcement of such programs against their coal constituencies, and of paying for the programs in an era of dwindling state resources.

The Council appreciates very much the opportunity to submit this letter for the record.

With best regards,



Thomas J. FitzGerald  
Director, Kentucky Governmental  
Accountability Project, KRC

# Mining Industry Council of Missouri



Tel. (314) 635-7308 • Box 725 • 225 E. Capitol • Jefferson City, Mo. 65102

July 1, 1985

INFORMATION COPY

The Honorable John W. Warner III  
Chairman, Energy and Mineral Resources Subcommittee  
Room 417, Russell Building  
Washington, D. C. 20510

Dear Senator Warner:

We are pleased that you have scheduled an oversight hearing on OSM's proposed cost recovery through permit fees, to be held Tuesday, July 9, 1985 in Washington D. C.

While we will not be able to appear in person to testify in opposition to the OSM proposal, we would appreciate having the enclosed statement included in the record of the hearing.

Thank you.

Sincerely,

  
MINING INDUSTRY COUNCIL OF MISSOURI  
W. E. Marbaker II  
Executive Secretary

rms

enclosure - Statement on OSM Proposal

STATEMENT

OF

T W. E. MARBAKER II

EXECUTIVE SECRETARY

MINING INDUSTRY COUNCIL OF MISSOURI

For the record of the  
oversight hearing on the  
Office of Surface Mining's proposed cost recovery  
through permit fees

My name is William E. Marbaker II. I am Executive Secretary of the Mining Industry Council of Missouri which is a trade association representing the principal mining companies in Missouri. Coal is one of the ten commodity groups which make up the Council; these remarks are offered on behalf of our coal group members.

The proposal advanced by OSM to collect fees on federal lands and federal program states, and the proposal to broaden this concept to eliminate state program grants contained in the GAO study are flawed on ethical grounds and as practical concepts.

The ethical objection is that Congress in effect made a deal with the states; you develop a program to administer SMCRA in your state and the federal government will bear half the cost. On a basis of this promise spelled out in SMCRA, Missouri passed enabling legislation. While it is pure speculation at this time, there is, and was at the time the legislation was passed, reason to doubt that the legislation would have won approval without this incentive. To propose removal of the incentive at this time is to go back on the pledged word of a Congress and a President. It would be a breach of faith and no words, not even the most eloquent argument, can alter that.

As a practical matter the proposal is flawed even as SMCRA itself is flawed in that the cost impact of reclamation, for example, falls unequally on the western mines which can have yields in excess of 100,000 tons per acre, and the Missouri mines which rarely yield 5000 tons per acre. The net effect is that a Missouri operator must reclaim at least twenty times as much land as his western counterpart to get the



same quantity of coal. The idea of recovering administrative and enforcement costs with an average fee per ton mined would in turn be unfair to the western miner who would pay many times more than the Missouri miner, yet the Missouri miner would be less able to absorb the additional cost because of the marginal nature of his operation.

The concept is flawed in our opinion because it would assess a "user fee" against the miner, in spite of the fact that the program does not exist for his benefit, but rather for the benefit of the public.

Finally, we have a problem with the broad brush reasoning that concludes on the basis of rather sketchy study that the cost burden shifting will not result in significant changes in market patterns. Such minor changes in market patterns are much easier to deal with as mathematical abstractions than they are at the local level in the form of closed down mines and lost jobs. It is important to bear in mind that coal mining tends to impact small communities economically, communities that prosper or fail with the local mine. Market forces may indeed force a mine to close or reduce employment, but why cause this to occur by regulation?

## R E S O L U T I O N

WHEREAS, The Congress of the United States has attested to the importance of a viable and stable domestic mining industry in the National Mineral Policy Act of 1970; and

WHEREAS, The domestic minerals industry is in stressed financial condition, failing to recover from the recession of the early '80's; and

WHEREAS, The domestic mining industry needs support from our government in its determination and effort to turn its economic condition around in spite of state subsidized competition from abroad and the negative impact on foreign trade of the strong U. S. dollar;

NOW, THEREFORE, BE IT RESOLVED THAT, we, the Mining Industry Council of Missouri urge the Congress in its deliberations on tax reform to bear in mind the tenuous financial condition of the mining industry and adopt no measures in tax reform such as the phase-out of percentage depletion, which will add to the problems our industry faces.



A handwritten signature in cursive script, appearing to read "Samuel C. Jones", written over a horizontal line.

PRESIDENT

A handwritten signature in cursive script, appearing to read "A. H. Baker", written over a horizontal line.

EXECUTIVE SECRETARY

**NERCO INC.**  
 111 S.W. COLUMBIA, SUITE 800  
 PORTLAND, OREGON 97201  
 TELECOPIER 503-241-2819  
 TELEPHONE 503-796-6600

WILLIAM W. LYONS, VICE PRESIDENT



July 2, 1985

The Honorable John W. Warner, Chairman  
 Senate Subcommittee on Natural  
 Resources Development & Production  
 Dirksen Senate Office Building #306  
 Washington, D.C., 20510

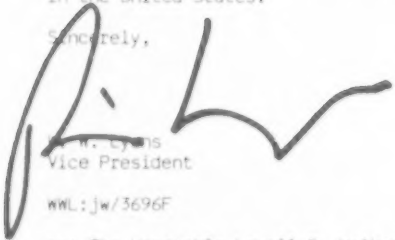
Dear Senator Warner:

We greatly appreciate the opportunity to express our views concerning Office of Surface Mining and General Accounting Office proposals to charge coal mine operators fees for OSM regulatory activities. We are in agreement with you that regulation of the coal industry pursuant to the Surface Mining Control and Reclamation Act of 1977 was determined to be in the public interest and thus should be funded by the Federal Government. We also believe that an examination of the type you are giving this issue in your subcommittee will make this evident.

Attached please find a statement for the Senate Subcommittee on Natural Resource Development and Production record of July 9, 1985.

NERCO, Inc., through its subsidiary NERCO Coal Corporation, owns and operates surface coal mines in Alabama, Indiana, Kentucky, Montana, Tennessee, and Wyoming, and is among the ten largest coal producers in the United States.

Sincerely,

  
 W. W. Lyons  
 Vice President

WWL:jw/3696F

cc: The Honorable Lowell P. Weiker  
 The Honorable Malcolm Wallop  
 The Honorable Don Nickles  
 The Honorable Frank H. Murkowski  
 The Honorable John Melcher  
 The Honorable Dale Bumpers  
 The Honorable Jeff Bingaman  
 The Honorable John D. Rockefeller

STATEMENT OF NERCO, INC. CONCERNING PROPOSALS  
FOR CHARGING COAL MINING OPERATIONS COST RECOVERY  
LEVEL FEES FOR FEDERAL REGULATORY ACTIVITIES

NERCO, Inc. is the partially owned mining and natural resource development subsidiary of PacifiCorp (formerly Pacific Power and Light Company). NERCO, Inc., through its subsidiaries, owns and operates surface coal mines in Alabama, Indiana, Kentucky, Montana, Tennessee and Wyoming, and is among the ten largest coal producers in the United States. We offer the following comments with respect to proposals to charge mining operators cost recovery level fees for federal activities associated with the regulation of coal mining operations:

- The Surface Mining Control and Reclamation Act has as its first statement of purpose to "establish a nationwide program to protect society and the environment from the adverse effects of coal mining operations." The primary beneficiaries of the regulatory program implementing the Act are members of the public at large whose welfare is protected. It is appropriate that regulatory costs be paid for by this broad beneficiary class, as is the case with most other environmental programs.
- This is a particularly bad time to consider regulatory action of this type. It will have the effect of further eroding the health of the domestic coal industry which is already facing difficult economic circumstances, including stiff foreign competition in both domestic and world markets.
- The full cost recovery approach proposed by the General Accounting Office and the Office of Surface Mining removes incentives for the regulatory agency to be cost conscious or diligent in administering permit and compliance programs. It is contrary to this administration's efforts to restrain the growth of government.
- OSM and the GAO propose to charge for the costs of agency involvement in processing mining plans and permit applications. Frequently the level of OSM activity in these matters is largely a function of citizen involvement outside the control of either the mine operator or the agency. We do not believe that mine operators should be required to pay for costs associated with citizen involvement in the regulatory process. We particularly object to being required to pay for increased agency expenses caused by citizen group challenges to permits, mine plans, etc., which are frequently without merit.
- The inappropriateness of characterizing mine operators as the beneficiaries of OSM regulatory activities is brought home by the agency's permitting and citizen complaint enforcement activities. In the former, pre-existing rights to develop mineral property are constrained or may even be denied. In the latter, the service is clearly provided to the complainant and frequently results in disadvantage to the permittee.

- The GAO recommendation to terminate grants to states for implementing the Surface Mining Control and Reclamation Act undercuts the Act's policy of encouraging the states to assume enforcement responsibility.
- OSM's rulemaking activity should not proceed without the regulatory impact analysis specified by Executive Order 12291. OSM itself notes in its notice of proposed rulemaking that it did not have the means to do more than approximate the costs of its proposal. Furthermore, OSM only included costs incurred at its technical centers and not at OSM headquarters or other OSM offices in its approximations. Because of its broad policy ramifications, the cost/benefit analysis indicated in the Executive Order would be particularly beneficial. In any event, this rulemaking should not proceed without more complete information concerning its costs and impacts.



## Pennsylvania Coal Mining Association

212 North Third Street, Suite 201, Harrisburg, PA 17101

(717) 233-7909  
800 COAL NOW (PA ONLY)

July 12, 1985

Honorable John Warner, Chairman  
Natural Resources Development &  
Production Subcommittee  
Senate Energy & Natural Resources  
Committee  
Washington, D.C. 20510

Dear Senator Warner:

The Pennsylvania Coal Mining Association, although unable to schedule participation in the oversight hearings on OSM's proposed cost recovery program, wishes to submit the attached comments for the record.

The PCMA is a trade association representing 100 Pennsylvania surface mining companies and 135 associated service and supply companies. Our members account for approximately 75% of the surface mined bituminous coal produced in Pennsylvania. 39% of our members are small operators by definition. 60% of these produce less than 50,000 tons/year. Only six of our companies produce more than 500,000 tons/year.

Obviously, any program imposing unjustifiable and unreasonable costs on the coal mining industry is of great concern and unacceptable to the PCMA.

We do want to express our appreciation for your initiative in holding a hearing to hear the views and concerns of the industry.

Sincerely,

*J. Anthony Ercole*  
J. Anthony Ercole  
Executive Vice President

JAE:tmg



## COST RECOVERY THROUGH PERMIT FEES

The GAO recommendation for full cost recovery: 100% recovery of OSM program costs, phase-out of State grants program, and a national coal tax are abominable. These misguided ridiculous recommendations are unsubstantiated by economic analysis as well as unjustified and contrary to the intent of Congress and SMCRA.

The GAO, and subsequently OSM, have construed the coal mine operator to be the beneficiary of the regulatory programs spawned by SMCRA. The "Findings" (Section 101, P.L. 95-87), however, contradict that premise. Congress found that it was in the **national interest** to insure an economically healthy mining industry; that it was necessary and urgent to minimize damage to the environment, the productivity of soil and **to protect the health and safety of the public**; that reasonable regulation is appropriate and necessary to **minimize adverse social, economic and environmental effects** of mining; standards were essential to insure that competition in interstate commerce would not be used to undermine **the ability of the States** to maintain adequate standards on mining operations; and that mining operations contribute to the **economic well-being, security, and general welfare of the Nation**. There is not one word of benefits to the mining industry in Section 101.

In the Purposes (Section 102, P.L. 95-87), Congress, again and with specificity, designated the beneficiaries of SMCRA: establish a nationwide program to protect **society** and the **environment**; assure the rights of **surface landowners** and **other persons** with a legal interest, assist **the States** in developing and implementing a program; assure procedures for **public** participation; and exercise full Federal powers to insure protection of the **public** interest. The beneficiaries as intended by Congress are quite evident.

In addition, Congress intended in creating an Office of Surface Mining Reclama-

tion and Enforcement that the Office would assist States in developing, implementing and administering regulatory programs. Congress mandated in Section 201 that the Secretary **shall** administer the State grant-in-aid program and further delineated the procedures for making annual grants in Section 705.

The PCMA finds it impossible to arrive at the same conclusions as the GAO relative to the primary beneficiaries. Congress found that regulation of the coal mining industry is in the public interest. Congress also recognized that States would need federal financial assistance to adequately regulate the mining industry. GAO, consequently OSM, evidently have concluded that Congress erred or was ill-advised in doing so.

The legislative history of P.L. 95-87 shows a great concern by Congress about economic burdens to the economy in general and the coal industry in particular. Even in determining the implementation of the reclamation fees, Congressional research went to great pains to project costs to the consumers and the industry. Are we to conclude that concern has gone by the wayside, clearing the way for implementation of the GAO recommendations through the OSM proposal for cost recovery without any substantive analysis?

Where Congress was concerned about implementing a reasonable reclamation fee that would meet funding needs for program objectives without burdening the coal industry and exerting inflationary pressures on the economy, the OSM proposal for cost recovery has been put forth without an appropriate or substantive economic analysis. There has not been a regulatory impact analysis to determine coal production shifts or the adverse impact on the export market as well as the domestic market. If the cost recovery program of OSM leads to implementation of GAO's recommendation to phase out State grants—and it surely will—what is gained where State programs revert to OSM?

The GAO reports an average increase of 11.7 cents/ton which would not affect the nationwide demand for coal. This is not only naive but a strong indication of a lack of concern regarding foreign competition. More importantly, however, is the creation of inequities in interstate commerce by a range of increases from 3.8 to 38.8 cents which is contrary to the findings of Congress in Section 101 of SMCRA.

In Pennsylvania the cost increase is 16.8 cents/ton according to GAO figures based on 1984 regulatory costs and 1982 production of 80 million tons. If GAO had used 1983 production figures of 68 million tons that cost increase would be 19 cents/ton. GAO seems little concerned that the **only** significant shift in production would be 1.5 million tons from Pennsylvania to West Virginia. In a State like Pennsylvania where 80% (more than 500 of 600) of the surface miners are small operators by definition a shift of 1.5 million tons is devastating. An employment decline of 12,000 jobs or 32% has occurred since 1975 in the Pennsylvania Bituminous coal industry. GAO evidently wants to assure that the decline will continue at least until 1990 and possibly thereafter.

GAO admits there was no attempt to analyze the effect of cost recovery because of the difficulty in obtaining financial data. GAO had no reservations, however, in justifying their recommendations on the basis of responses from three coal associations and eight mining firms. Even as an overview sample this can only be considered anemic, superficial and invalid in relation to the 10,400 mines producing coal in the United States.

If we are to assume that GAO and OSM are correct in proposing the recovery of regulatory costs through user fees for providing services and privileges that benefit identifiable recipients, the proposed program should provide for the **complete** recovery of **total** costs. Fees must be established, therefore, for the recovery of costs for citizens inspections, the review of petitions under Section

522 of the Act, the review of objections and comments on permit-related issues, and litigation arising on program-related issues. If the GAO objective, as stated, was to estimate OSM's costs to regulate coal mining, the costs incurred in performing the functions mentioned above cannot be transferred to the coal operator by construing the operator to be the beneficiary. Since OSM has developed a scheme for anticipated fees based on the actual cost of processing permits, it would not be difficult to establish fees for functions benefitting recipients other than coal operators. This would negate or significantly reduce the support costs to be recovered.

To add to this illogical course of action reflected in the OSM proposal, financial assistance for the small operator would continue in the permit process; but fees would be charged for inspection and enforcement activities. The small operator, on balance, would get no assistance whatsoever.

For obvious reasons the OSM proposal for cost recovery and the GAO recommendations are unacceptable. These will result in another onerous economic burden for the coal mine operator. The small operators cannot absorb any increase in costs since they cannot pass through the additional costs to the user. U.S. coals are not competitive with foreign coals. Not only have foreign markets been lost, but domestic markets are being lost to foreign coals. The ultimate payers of the costs under the proposed cost recovery program will be the consumer through higher utility bills and higher prices for goods and services.

The PCMA opposes any cost recovery because it will interfere with interstate commerce, exert inflationary pressures, shift production and create unemployment. Congress had the foresight to provide for the prevention of such consequences in P.L. 95-87. Bureaucratic action cannot be allowed to negate that foresight.

**Russell Coal Incorporated**

July 17, 1985

The Honorable John W. Warner, Chairman  
Natural Resources Development and  
Production Subcommittee  
Senate Energy and Natural Resources Committee  
Washington, D.C. 20510

RE: Coal Mining Permit Fees

Dear Senator Warner:

This statement is submitted on behalf of Russell Coal, Incorporated in reference to the final General Accounting Office's (GAO) report on full cost recovery by the Office of Surface Mining, which was the subject of an oversight hearing held on July 9, 1985. It is requested that this letter be made a part of the hearing record.

Russell Coal, Incorporated is a relatively small coal producer in Alabama, with an annual production of approximately 300,000 tons. It is from this prospective that we comment upon the GAO report.

GAO concludes that some small coal companies might find any production cost increase, no matter how small, a significant burden. This is an understatement. Small coal companies cannot spread out production cost increases as can a larger company with greater production and more diverse customers and markets. A matter of a few cents a ton can make an extreme difference in competitive bidding on utility contracts, and many small coal operators' business is tied to the utility market.

GAO predicted that the impact on coal demand and production from full cost recovery would be "minimal". What is minimal is the study and research which GAO conducted in preparing its proposal. GAO's report lacks an appropriate substantive economic analysis, neglects to do a regulatory impact analysis, and fails to adequately address the impacts on the Office of Surface Mining if it had to take over additional state programs. Although GAO proposes full regulatory cost recovery, it neglected to

The Honorable John W. Warner  
Page Two  
July 17, 1985

specifically define and delineate all cost to be charged coal operators.

Despite numerous comments to the contrary, GAO persists in believing that coal operators granted a mining permit benefit from special services and privileges provided by the federal government and therefore, should bear their cost. Coal production and coal operators existed for many years prior to the passage of the Federal Surface Mining Act in 1977. The primary intent of that Act was to establish national environmental protection performance standards to protect public health and safety and the environment. The standards were imposed on coal operators by incorporating them in a permit to mine. It was never perceived that the federal government was somehow bestowing special services and privileges upon the coal industry by enacting these standards upon the coal industry. Rather, the standards were for the benefit of the public. It does not seem fair to impose these standards on the coal industry for the benefit of the public, and then require the industry to pay for the full cost of administering and enforcing these standards for the benefit of the public.

In conclusion, we submit that GAO's recommendations for full regulatory cost recovery and elimination of financial assistance to states are ill founded, would be a burden primarily to small operators, and would further erode the competitiveness of American coal in the world markets. Therefore, we urge that the GAO recommendations not be implemented by the Office of Surface Mining.

Very truly yours,

RUSSELL COAL, INCORPORATED

  
Richard E. Dick  
General Counsel

RED/jb  
RD-31

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